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Understanding the Establishment Clause: A Revisit

Robert A. Sedler
Wayne State University, rsedler@wayne.edu

UNDERSTANDING THE ESTABLISHMENT CLAUSE: A REVISIT

ROBERT A. SEDLER†

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† Distinguished Professor of Law, Wayne State University Law School. A.B., 1956, University of Pittsburgh; J.D., 1959, University of Pittsburgh.

I. INTRODUCTION: THE ESTABLISHMENT CLAUSE AND THE PERSPECTIVE OF CONSTITUTIONAL LITIGATION

Some sixteen years ago, I undertook to explore the Establishment Clause from the perspective of constitutional litigation.[1] My purpose in doing so was to respond to what, at that time, had been extensive and ongoing academic criticism of the Supreme Court's Establishment Clause jurisprudence and of its decisions under that jurisprudence.[2] A common thread running through this criticism was that the Court had failed to develop and articulate an underlying theory as to the meaning of the Establishment Clause and its function in our constitutional system.[3]

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1. Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317 (1997). This lengthy law review article was the subject of a symposium hosted by the *Wayne Law Review*. The contributors to the symposium, who commented on my article, were Professor Jesse H. Choper, *The Unpredictability of the Supreme Court's Doctrine in Establishment Clause Cases*, 43 WAYNE L. REV. 1439 (1997); Professor John H. Garvey, *The Architecture of the Establishment Clause*, 43 WAYNE L. REV. 1451 (1997); and Professor William Marshall, *The Limits of an Establishment Clause "Restatement": A Response to Professor Sedler*, 43 WAYNE L. REV. 1465 (1997).

2. Sedler, *supra* note 1, at 1317. At that time, the amount of academic commentary on the Establishment Clause, and on the Religion Clauses in general, had been enormous. Although the focus of the article was on the operation of the Establishment Clause in practice, in the article, I examined at least a portion of the voluminous academic commentary at some length and tried to obtain an understanding of some aspects of the academic debate. Although I had little interest in joining in that debate and did not do so, I did cite a number of academic writings when they seemed relevant.

3. *See, e.g.*, William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 496-97 (1986).

> The Court's inconsistency pervades more than just the results of the cases; the Court has also wavered constantly in its depiction of the underlying theory of the [E]stablishment [C]lause. At times[,] the Court has indicated the clause mandates a wall of separation between church and state. At other times, the Court has stated that neutrality is required. In still other instances, the Court has spoken of accommodation.
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> It is, then, no wonder that establishment jurisprudence has been universally criticized. The Court itself has acknowledged its own "considerable internal inconsistency" [quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970)], candidly admitting that it has "sacrifice[d] clarity and predictability for flexibility" [quoting Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980)], and commentators have found the area hopelessly confused.

Id. at 496-97 (footnotes omitted).

Academic commentary on the underlying theory of the Establishment Clause has continued apace. *See, e.g.*, Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006); Richard C. Schragger, *The Role of the Local in Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810

Much of the criticism of the Court's approach to the Establishment Clause related to the Court's use of the "*Lemon* test" [4] as the articulated methodology to resolve all of the Establishment Clause issues coming before it for review. [5] This criticism regarding the *Lemon* test had surfaced among Justices of the Court itself.[6]

I had, and continue to have, a very different view of the Court's Establishment Clause jurisprudence and its decisions under that jurisprudence. In the earlier article, I developed fully my view of the Court's Establishment Clause jurisprudence, and it was very different from the view of most of the academic commentators at that time. Most of the academic commentators approached the Establishment Clause

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(2004); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

4. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

5. According to one commentator, the *Lemon* test is "irrelevant or indeterminate when applied to most serious establishment issues." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992). Another commentator argued that the broad disagreements about the meaning and viability of the *Lemon* test have rendered the test "only an imperfect tool for enforcing the separation principle" and have "produced an area of law that is chaotic and almost entirely unpredictable." Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 467, 469.

One of the most prominent Establishment Clause commentators, Professor Jesse Choper, had set forth a comprehensive theory as to the meaning of the Establishment Clause that would reshape completely the Court's Establishment Clause jurisprudence and redefine the function of the Establishment Clause in terms of "securing religious liberty." JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION IN THE RELIGION CLAUSES 35 (1995). Under Professor Choper's thesis, the Establishment Clause and the Free Exercise Clause, taken together, would be interpreted in light of four principles: the deliberate disadvantage principle, the burdensome effect principle, the intentional disadvantage principle, and the independent impact principle. *Id.* Applying these principles to the Court's decided cases, Professor Choper would reach dramatically different results from those reached by the Court, sometimes finding an Establishment Clause violation when the Court did not, and sometimes finding no violation when the Court did. *Id.*

6. *See generally* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the . . . crooked lines and wavering shapes its intermittent use has produced"); *see also* Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in part, dissenting in part) (noting that "[p]ersuasive criticism of *Lemon* has emerged"); *see also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring) (noting that "this action once again illustrates certain difficulties inherent in the Court's use of the [*Lemon*] test" and that there is a "tension in the Court's use of the *Lemon* test to evaluate an Establishment Clause challenge to government efforts to accommodate the free exercise of religion"); *see also* Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (arguing that the *Lemon* test has "not provided adequate standards for deciding Establishment Clause cases").

from a truly academic perspective. They were searching for an underlying theory of the Establishment Clause that would provide answers to all Establishment Clause questions within the analytical framework of that underlying theory and that would produce results consistent with the premises on which the theory was based. My view of the Court's Establishment Clause jurisprudence, to the contrary, was not based on the search for an underlying theory or on the perceived absence of such a theory in the Court's Establishment Clause jurisprudence. Rather, my view had been formed by my experience as a constitutional litigator in litigating and advising on Establishment Clause issues and in trying to bring this experience to bear in explaining the Establishment Clause to my students.[7]

It was my submission that when one looked at the Establishment Clause from the perspective of constitutional litigation, it was indeed possible to ascertain what I referred to as the "law of the Establishment Clause." The "law of the Establishment Clause" is not at all difficult to understand or to apply to the resolution of the Establishment Clause issues that in fact arise in practice. It is the "law of the Establishment Clause" that is used by litigating lawyers and by the courts—including the Supreme Court—to litigate and resolve these issues.

The purpose of the writing then was to explain the nature and operation of the "law of the Establishment Clause." I contended that the "law of the Establishment Clause" consists of four components. First, there is an overriding principle: the Establishment Clause commands complete official neutrality toward religion. Second, there are three operative principles: the three prongs of the *Lemon* test. Third, there are a number of subsidiary doctrines, mostly relating to the application of the second *Lemon* "effect of advancing religion" prong. Fourth, and most importantly in practice, there are the Court's precedents in what I identified as the five major areas of Establishment Clause litigation: (1) religious practices in the public schools; (2) financial aid or governmental benefits to religion; (3) governmental action purportedly "advancing religion"; (4) "entanglement" or governmental interference in religious matters; and (5) preference for religion or between religions, which includes governmental action to protect the religious freedom of individuals or institutions.[8]

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7. *See generally* ACLU v. City of Birmingham, 791 F.2d 1561 (6th Cir.) (involving holiday season displays), *cert. denied*, 479 U.S. 939 (1986); Doe v. City of Clawson, 915 F.2d 244 (6th Cir. 1990) (involving holiday season displays); Stein v. Plainwell Cmty. Sch., 822 F.2d 1406 (6th Cir. 1987) (involving prayer at high school commencements). At that time, I had litigated cases involving holiday season displays.

8. Sedler, *supra* note 1, at 1322-24.

The "law of the Establishment Clause" then and now is found in the Establishment Clause cases decided by the Supreme Court and in the Court's opinions setting forth its reasons for deciding those cases as it did. As in other areas of constitutional law, the "law of the Establishment Clause" has developed in a line of growth through the process of constitutional litigation.[9] Because the process of constitutional litigation consists of case-by-case adjudication of specific issues, it is not a process that readily lends itself to the development of a comprehensive underlying theory or broad, general propositions.[10] Rather, in its case-by-case adjudication of specific Establishment Clause issues, the Court has promulgated principles and doctrines and has established precedents. These principles, doctrines, and precedents are applied in subsequent cases, in which they may undergo some degree of refinement and modification. The precedents build on each other and form a "cluster of precedents" in the different Establishment Clause areas. The Court draws upon these "clusters of precedents" whenever a new issue arises in a particular area, and the precedents, supplemented when necessary by applicable principles and doctrines, provide the parameters for the resolution of the new Establishment Clause issue before the Court.

The "law of the Establishment Clause," as it existed at the time of my earlier article, had been developing for almost fifty years.[11] During this time, a large number of specific Establishment Clause issues had been resolved by the Court, "clusters of precedents" had been created in all of the major areas of Establishment Clause litigation, and principles and doctrines had been promulgated, refined, and applied in a number of contexts. As a result, it was my submission that the "law of the Establishment Clause" could be considered to be fairly settled and that

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9. *See* Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1054-55 (1979) (discussing the development of constitutional law in a line of growth); *see also* Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 118-20 (1983).

10. In their demand that the Supreme Court formulate a comprehensive underlying theory and promulgate broad, general propositions of constitutional law, academic commentators may sometimes lose sight of the fact that the Court's constitutional jurisdiction is limited to deciding the "case or controversy" before it and that the Court is supposed to decide constitutional issues on the "narrowest possible ground." As the Court has stated, a constitutional ruling should not be formulated "in broader terms than are required by the precise facts to which the ruling is to be applied." Rescue Army v. Mun. Court of L.A., 331 U.S. 549, 571, n.37 (1947). Thus, in an Establishment Clause case coming before the Court, the Court's focus is properly on the resolution of the particular Establishment Clause issue presented rather than on the formulation of a comprehensive underlying theory or the promulgation of broad, general principles of Establishment Clause jurisprudence.

11. The Court's modern Establishment Clause jurisprudence is considered to have begun with *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

new Establishment Clause issues that would arise would be litigated and resolved within the analytical framework of the existing principles, doctrines, and precedents.

In the present Article, I propose to revisit the "law of the Establishment Clause" in light of the Establishment Clause cases decided by the Supreme Court in the intervening sixteen years. The most salient feature emerging from this revisit is that there are now relatively few Establishment Clause cases coming before the Court. In the 15-year period between 1997 and the end of the Court's last Term in 2012, I have only counted seven cases in which the Supreme Court decided an Establishment Clause issue, including the Court's most recent decision, which was based on both the Establishment Clause and the Free Exercise Clause. Two of these cases involved financial aid to religion. In both cases, a Court majority held that the particular form of financial aid—in one case, the inclusion of parochial school students with public school students in the loan of computers and other instructional materials,[12] and in the other, the inclusion of vouchers for tuition at parochial schools along with other financial assistance for the parents of children attending underperforming public schools[13]—did not violate the Establishment Clause. In two other cases, decided the same day, involving public displays that included the Ten Commandments, the Court held 5-4 that one display violated the Establishment Clause,[14] while the other display did not.[15] In the fifth case, the Court held violative of the Establishment Clause a school district's policy authorizing a student election to determine whether the student body wanted to have a student deliver a "brief invocation and/or message" at varsity football games.[16] In the sixth case, the Court upheld, against an Establishment Clause challenge, a provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[17] providing that "'[n]o government shall impose a substantial burden on . . . a person residing in . . . an institution,' unless

12. Mitchell v. Helms, 530 U.S. 793 (2000).

13. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

14. McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844 (2005). After a federal court held that a county's display of the Ten Commandments, standing alone, violated the Establishment Clause, the county expanded the display to include eight other documents. *Id.* at 856. These documents had either a religious theme or were excerpted to highlight a religious element, such as the Preamble to the Constitution and the Mayflower Compact. *See id.* at 856-57.

15. Van Orden v. Perry, 545 U.S. 677, 681 (2005) (involving a display of a donated monument inscribed with the Ten Commandments on the Texas State Capitol grounds along with seventeen monuments and historical markers commemorating the "people, ideals, and events that compose Texan identity").

16. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306 (2000).

17. 42 U.S.C. § 2000cc-1(a)(1) to (2) (2000).

the burden furthers 'a compelling governmental interest,' and does so by the 'least restrictive means.'"[18]

In the seventh and most recent case, the Court applied both the Establishment Clause and the Free Exercise Clause to find a "ministerial exception" to federal civil rights laws that precluded the application of those laws to invalidate the dismissal of a teacher at a private religious school who had been given the status of a religious official by the denomination operating the school. [19] This was the extent of Establishment Clause decisions by the Supreme Court in a fifteen-year period.[20] As will be pointed out subsequently, the Court's decisions in all

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18. Cutter v. Wilkinson, 544 U.S. 709, 712 (2005) (quoting 42 U.S.C. § 2000cc-1(a)(1) to (2)). The provision was invoked by prison inmates who contended that the prison was interfering with their religious freedom by denying them the ability to hold religious services. *Id.* at 712-13. The state argued unsuccessfully that this required "accommodation" for religious freedom amounted to an unconstitutional preference for religion. *Id.* at 713.

19. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012) (holding that the application of the employment discrimination provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, to invalidate the dismissal of the teacher at this school would violate both the Free Exercise Clause and the Establishment Clause). In cases such as this, the Establishment Clause and the Free Exercise Clause operate in tandem. The interference with religious freedom violates the Free Exercise Clause, and the involvement of the state in the teaching personnel decisions of a religious school is an unconstitutional entanglement with religion and so violates the Establishment Clause as well.

20. The Court also dismissed some Establishment Clause claims on standing or related grounds in three cases. *See* Hein v. Freedom from Religion Found., Inc., 549 U.S. 1109 (2007) (holding that a federal taxpayer did not have standing to bring a taxpayer's suit to challenge the President's issuance of an executive order to ensure that faith-based community organizations would be able to apply for federal financial support for activities that were not inherently religious); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (holding that the non-custodial parent did not have standing, over objections of the custodial parent, to assert a challenge that daily classroom recitation by the children's teacher of the Pledge of Allegiance with the words "Under God," added in 1954 by Congress, violated the Establishment Clause); *see also* Salazar v. Buono, 559 U.S. 700 (2010) (holding, 5-4, on standing grounds and rules pertaining to injunctions that a federal court could not order removal of a Latin cross placed on a federal preserve in 1934 to honor American soldiers who had died in World War I, when Congress had dealt with the matter by legislation and had directed the Secretary of the Interior to transfer land with the cross to a veteran's organization in exchange for privately owned land elsewhere in the preserve).

During this time, apart from the decision in *Hosanna-Tabor*, the Court decided only one other Free Exercise case, holding that a state did not violate the Free Exercise Clause by excluding students who were pursuing a devotional theology degree from a state scholarship program for college students. Locke v. Davey, 540 U.S. 712 (2004).

For the upcoming 2013 Term, the Court has granted certiorari in an Establishment Clause case involving the process by which a legislative body selects members of the clergy to deliver "legislative prayer." Galloway v. Town of Greece, 681 F.3d 20 (2d Cir.

of these cases involved the Court's application of the components of the "law of the Establishment Clause." The "law of the Establishment Clause," to which we will now turn, remains fully viable as an explanation of the analytical framework under which the Court decides Establishment Clause cases.

II. THE STRUCTURE OF THE "LAW OF THE ESTABLISHMENT CLAUSE"

> As stated at the outset, the "law of the Establishment Clause" consists of four elements. First, there is an overriding principle: the Establishment Clause commands complete official neutrality toward religion. Second, there are three operative principles, the three prongs of the *Lemon* test. Third, there are a number of subsidiary doctrines, mostly relating to the application of the second *Lemon* "effect of advancing religion" prong. Fourth, and most importantly in practice, there are the Court's precedents in what I identified as the five major areas of Establishment Clause litigation: (1) religious practices in the public schools; (2) financial aid or governmental benefits to religion; (3) governmental action purportedly "advancing religion"; (4) "entanglement" or governmental interference in religious matters; and (5) preference for religion or between religions, which includes governmental action to protect the religious freedom of individuals or institutions.[21]

In the present Article, I discuss the components of the "law of the Establishment Clause." This discussion will briefly summarize the more complete discussion in the earlier article and will discuss the Court's decisions in the last sixteen years as they relate to each component. It should be noted that there will be some overlap in this discussion. The overlap is necessary to maintain continuity in the discussion of each of the components, and I have concluded that it is better to repeat some of the discussion rather than risk a break in the continuity.

A. The Overriding Principle: Complete Official Neutrality

The overriding principle of the Establishment Clause is that the Establishment Clause commands complete official neutrality toward religion. The government cannot favor religion over non-religion, and it

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2012), *cert. granted*, 133 S. Ct. 2388 (2013). *See infra* notes 274-81 and accompanying text.

21. Sedler, *supra* note 1, at 1322-24.

cannot favor one religion over another.[22] The overriding principle of complete official neutrality toward religion has replaced the earlier concept of the Establishment Clause as creating a "wall of separation between church and state."[23] Justice Douglas in *Zorach v. Clauson* pointed out the problems with the "wall of separation" concept.[24] Justice Douglas noted that while the First Amendment "reflects the philosophy that Church and State should be separated," "[it] does not say that in every and all respects there shall be a separation of Church and State."[25] "Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."[26] The neutrality principle furthers the "philosophy of separation" by precluding the government from favoring religion, but at the same time, it does not require the government to be hostile to religion.[27] Because the Establishment Clause does not require the government to be hostile to religion, obviously, the government can include religious institutions in the services it provides to the public generally, such as police and fire protection,[28] and likewise, the government can include religious institutions among recipients of governmental funding to provide secular services.[29] In addition, the principle of complete official neutrality is not breached when the government provides religious organizations with equal access to governmental facilities, such as access to a public forum. This being so, such equal access is required by the First Amendment freedom of speech principle of content neutrality.[30]

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22. *See* Wallace v. Jaffree, 472 U.S. 38, 60 (1985).

23. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 146, 164 (1879)). Justice Black, writing for the Court, stated, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Id.* (quoting *Reynolds*, 98 U.S. at 164).

24. Zorach v. Clauson, 343 U.S. 306 (1952).

25. *Id.* at 312.

26. *Id.*

27. *Everson*, 330 U.S. at 18 (noting that the First "Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers[] [and] does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them").

28. As Professor Laycock has noted, police and fire protection are such a universal part of our lives that they have become part of the baseline, and to deny them to churches would put religion outside the protection of the law. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1005 (1990).

29. *See* Sedler, *supra* note 1, at 1374-76.

30. *See id.* at 1331-38, 1392-93; *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (discussing the equal access of religious speech to a designated public forum, here the use of after-school facilities in a public school).

The overriding principle of complete official neutrality toward religion is as close as the Court is likely to come in formulating an underlying theory as to the meaning of the Establishment Clause and its function in our constitutional system. Since the function of the Establishment Clause in our constitutional system is to promote complete official neutrality toward religion, it follows in theory that the constitutionality of any governmental action involving religion depends on whether or not that action is consistent with this overriding principle.[31]

This overriding principle, of course, does not provide much guidance for determining whether a particular governmental action involving religion violates the Establishment Clause. This is the function of the other components of the "law of the Establishment Clause." Nonetheless, the development and application of the other components of the "law of the Establishment Clause" are informed by the overriding principle of complete official neutrality toward religion.

This is evident with respect to the subsidiary doctrine of the non-discriminatory inclusion of religion. The Court has held that, at least in some circumstances, the government does not violate the Establishment Clause when it includes the religious with the secular in the receipt of governmental benefits.[32] At the time of the earlier article, I concluded, "Indeed, in all of the cases coming before it, the Court, although sometimes sharply divided, has managed to come up with a majority to hold that providing a particular benefit to the religious as well as the secular was constitutionally permissible."[33] This result was also obtained in the two later cases dealing with financial aid to religion, in which the Court, although again divided, has held that the particular form of aid did not violate the Establishment Clause.[34] The Court now appears to be disposed to uphold against Establishment Clause challenge any form of governmental financial aid that includes the religious with the secular. In this regard, since the religious is included with the secular in the receipt of governmental benefits, such inclusion is fully consistent with the overriding principle of complete official neutrality toward religion.

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31. At the time of the earlier article, there had been considerable academic discussion about the meaning of "neutrality." *See* Sedler, *supra* note 1, at 1340-41, nn.104-05.

32. *See id.* at 1358-59, 1390-93.

33. *Id.* at 1398-99.

34. Mitchell v. Helms, 530 U.S. 793 (2000) (considering the inclusion of parochial school students with public school students in the loan of computers and other instructional materials); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (considering the inclusion of vouchers for tuition at parochial schools along with other financial assistance for the parents of children attending underperforming public schools).

B. The Operational Principles: The Lemon Test

Under the *Lemon* test, in order for governmental action to be upheld under the Establishment Clause, (1) the action must have a secular legislative purpose, (2) its principal or primary effect must be neither to advance nor inhibit religion, and (3) it may not foster "excessive government entanglement with religion."[35] From the perspective of constitutional litigation, the *Lemon* test is best understood as comprising three operational principles reflecting "the cumulative criteria developed by the Court over many years."[36] When understood from this perspective, the *Lemon* test is not a talismanic test or even a comprehensive mode of analysis that by itself can be used to resolve all Establishment Clause issues arising in practice. The *Lemon* test simply sets forth three operational principles, which serve as a point of departure for Establishment Clause analysis. The application of the *Lemon* operational principles incorporates the subsidiary doctrines that have emerged from the Court's decisions in the major areas of Establishment Clause litigation.[37] In the earlier article, I said that the widespread academic dissatisfaction with the *Lemon* test at that time[38] resulted from the failure of most academic commentators to understand or accept the limited scope of the test in actual litigation. In actual litigation, the test does nothing more than set forth three operational principles that interact with subsidiary doctrines and precedents to provide the parameters for the resolution of the particular Establishment Clause issue before the Court.[39]

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35. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

36. *Id.* at 612. Professor Van Alstyne said that the first two *Lemon* elements were taken from *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963), and that the third element was taken from Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970). *See* William Van Alstyne, *What Is 'An Establishment of Religion'?*, 65 N.C. L. REV. 909, 909 n.2 (1987).

37. As of 1997, in every post-*Lemon* case, save one, the Court expressly (although with some disagreement by particular Justices) applied the *Lemon* test to the resolution of the Establishment Clause issue before it. The sole and glaring exception was *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Court employed a strictly historical "framers' intent" interpretation and concluded that the framers did not intend for the Establishment Clause to prohibit legislative prayer. The Court's aberrational "framers' intent" interpretation of the Establishment Clause in *Marsh* means that *Marsh* will have little if any extendibility as a precedent. *See infra* notes 274-78 and accompanying text.

38. *See* Sedler, *supra* note 1, at 1319-20.

39. *Id.* at 1344. One of the few academic commentators who saw utility in the *Lemon* test was Professor Daniel O. Conkle. Professor Conkle stated,

> Whatever its precise formulation, the essence of Lemon is a context-specific inquiry that requires the exercise of judgment. The Court must examine the government's purpose and the effect of its action, as well as the resulting relationship between religion and government. It must consider the degree to which the government is engaged in favoring or endorsing particular religious

1. The "Religious Purpose" Principle

Under the "religious purpose" principle, any governmental action taken solely for the purpose of advancing religion is unconstitutional. Whenever the government takes action solely for the purpose of advancing religion, the existence of this improper purpose alone renders the governmental action unconstitutional.[40] Thus, in *Wallace v. Jaffree*,[41] a "moment of silence" law that was found to have been adopted for the purpose of encouraging school prayer was unconstitutional, even though a "moment of silence" law, not found to have been adopted for this purpose, would be constitutionally permissible.[42]

In the earlier article, I said that it would be a rare case in which the "religious purpose" principle would control the outcome of an Establishment Clause challenge. This would be because whenever a governmental action has been undertaken for a religious purpose, it would usually also have the effect of advancing religion and so would be unconstitutional under the second *Lemon* principle. I went on to say that insofar as the "religious purpose" principle had surfaced in cases other than *Wallace v. Jaffree*, it had been primarily to counter the state's contention that the challenged governmental action had a religiously neutral effect.[43] From the standpoint of the litigating lawyer mounting an

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> beliefs and the degree to which this action might harm religious or irreligious minorities. Lemon does not provide a categorical, bright-line rule. Through its applications of Lemon, of course, the Supreme Court creates precedents that control the resolution of particular questions, thereby giving context-specific guidance to lower courts and to other governmental officials. But Lemon itself provides no more than a general standard, or "helpful signpost," for evaluating Establishment Clause challenges.

Daniel O. Conkle, *Lemon Lives*, 43 CASE W. RES. L. REV. 865, 870 (1993).

40. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1981).

41. *Id.*

42. *See* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 909 (1987). Professor Simson noted that this principle is defensible insofar as "it recognizes that a law adopted for reasons incompatible with the Establishment Clause should be struck down even though the law would be unassailable if adopted for valid reasons." *See also* Ira C. Lupu, *Which Old Witch?: A Comment on Professor Paulsen's Lemon Is Dead*, 43 CASE W. RES. L. REV. 883, 886 (1993). Professor Lupu said that the principle "is nothing more than a particularization of the general obligation that legislation be designed to pursue constitutionally permissible ends." *Id.*

43. Thus, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), the historical context of the enactment of the Arkansas anti-evolution law belied the contention that the law had the effect of advancing religiously neutral educational objectives. The Court noted, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence." *Id.* at 107-08. Likewise, in *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam), the state tried to justify the required posting of the Ten Commandments in public school classrooms on the ground that the Ten Commandments were the basis of the legal code of

Establishment Clause challenge, there would be no utility in undertaking the burdensome task of proving "religious purpose" when the challenge will succeed by making a showing of "religious effect." I concluded that, in practice, the first "*Lemon* principle would be invoked only in a rare case such as *Wallace v. Jaffree*, where the challenged governmental action, divorced from its 'religious purpose,' would not have the constitutionally impermissible effect of 'advancing religion.'"[44]

However, the first *Lemon* principle was given some vitality by the Supreme Court's 2005 decision in *McCreary County, Kentucky v. ACLU.* [45] The Court majority invoked the principle to hold unconstitutional the inclusion of the Ten Commandments in a "Foundations of American Law and Government" exhibit at a Kentucky county courthouse that was designed to show that the Commandments were a part of Kentucky's "precedent legal code."[46] The Court had previously held that a governmental display of the Ten Commandments standing alone violated the Establishment Clause, because the Ten Commandments constituted an "instrument of religion," so that a governmental display of the Ten Commandments had the purpose and effect of advancing religion.[47] However, it was assumed, as the Court held in a companion case decided the same day as *McCreary,*[48] that the inclusion of the Ten Commandments in a broader display of historical documents would advance a secular purpose and so would not violate the Establishment Clause.[49] Thus, if the Kentucky county's "Foundations of American Law and Government" exhibit was to be held unconstitutional under the Establishment Clause, it could only be because the exhibit violated the first *Lemon* "religious purpose" principle. As will be discussed more fully subsequently, the Court majority found that the

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western civilization and the American common law. The Court rejected this proffered justification as pretextual. *Id.* In the same vein, in *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987), the clear religious purpose behind the enactment of Louisiana's law requiring that "creation science" be taught along with evolution rendered pretextual the contention that the law had the effect of promoting "academic freedom."

44. Sedler, *supra* note 1, at 1345-47.

45. 545 U.S. 844 (2005).

46. *Id.* The Court majority consisted of Justices Souter, Stevens, O'Connor, Ginsburg, and Breyer. *Id.* at 849. Justice O'Connor filed a concurring opinion. *Id.* Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Kennedy, dissented. *Id.* at 849, 885.

47. *Stone*, 449 U.S. at 39 n.43.

48. Van Orden v. Perry, 545 U.S. 677 (2005).

49. This result would follow from the Court's decisions dealing with holiday season displays, in which the display of a religious symbol, such as a nativity scene or a menorah standing alone, would have the effect of advancing religion, while the inclusion of these symbols along with secular symbols in a broader holiday season display would have the secular effect of celebrating the holiday season and so would not violate the Establishment Clause. *See* Sedler, *supra* note 1, at 1400-03.

display was undertaken for the purpose of advancing religion in violation of the first *Lemon* prong and so was unconstitutional.[50]

McCreary is a case like *Wallace v. Jaffree*,[51] in which it was necessary to challenge the governmental action under the "religious purpose" principle because that action could not be successfully challenged under the "religious effect" principle. As I pointed out in the earlier article, from the standpoint of the litigating lawyer mounting an Establishment Clause challenge, there would be no utility in undertaking the burdensome task of proving "religious purpose" when the challenge would succeed by making a showing of "religious effect." This is why I concluded that, in practice, the first *Lemon* principle would be invoked only in a rare case like *Wallace v. Jaffree*, in which the challenged governmental action, divorced from its "religious purpose," would not have the constitutionally impermissible effect of "advancing religion."[52] We can now add *McCreary* to the example of such cases. However, *McCreary* may encourage lawyers to add a challenge under the "religious purpose" principle to the challenge under the "religious effect" principle. Often, when governmental officials undertake action that will have the effect of benefitting religion, they will try to score political points by emphasizing their religiosity and their support for religion by taking action that will benefit religion. In cases where the ability to demonstrate that the challenged governmental action has a religious effect may be less certain, it may be helpful to try make a showing of a violation of the "religious purpose" principle as well. In any event, the decision in *McCreary* now supplies another precedent for invoking the "religious purpose" principle of the *Lemon* test and may have given that principle some renewed vitality.

2. The "Advancing Religion" Principle

The second *Lemon* principle is that governmental action with the primary effect of advancing or inhibiting religion is unconstitutional. Where governmental action has this effect, the government has, whether it intended to do so or not, violated the overriding principle that the Establishment Clause commands complete official neutrality toward religion. The "advancing or inhibiting religion" principle represents the Court's value judgment in favor of an expansive interpretation of the

50. *See infra* notes 251-55 and accompanying text.
51. 472 U.S. 38 (1981).
52. Sedler, *supra* note 1, at 1345-46.

Establishment Clause and, to this extent, may be seen as promoting a "separationist" agenda.[53]

Under the "advancing or inhibiting religion" principle, any governmental involvement with religion is readily subject to constitutional challenge on the ground that it has a constitutionally impermissible "religious" effect. The government's demonstration of a secular purpose for its action, which is not at all difficult for the government to satisfy in most cases, thus becomes completely irrelevant. Stated simply, by adopting an "effects" test for Establishment Clause challenges, the Court has come down strongly on the side of "separation," and this is reflected in the large number of decisions invalidating governmental involvements with religion under the Establishment Clause.

However, the "advancing or inhibiting religion" principle, standing alone, is very difficult to apply in a dispositive way to resolve most Establishment Clause issues. Most governmental involvements with religion have the effect of "advancing or inhibiting religion" to some degree. Some involvements, such as school prayer or bible reading, appear not to have any other significant effect and so are unconstitutional.[54] However, many governmental involvements with religion also advance some secular objective as well and thus will have a "secular effect" in addition to the "religious effect." The classic example of a "dual effect" is governmental financial aid to parochial schools. Such aid has the effect of "advancing religion" because it supports the religious side of parochial school education. However, it also has the secular effect of "advancing education," as it supports the secular side of parochial school education as well and relieves the public schools from

53. In a number of contexts, the matter of a "purpose" test versus an "effects" test is of crucial importance in determining the scope of a particular constitutional provision. For example, the Court has used an "effects" test to determine the constitutionality of state regulation and taxation of interstate commerce. By holding that the negative aspect of the Commerce Clause invalidates state regulatory and tax laws that have a "discriminatory effect" on interstate commerce, without regard to a showing of "discriminatory purpose," the Court has made negative Commerce Clause challenges fairly easy to sustain and, in so doing, has gone a long way in preventing any form of "state protectionism." *See generally* Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure,* 31 WAYNE L. REV. 885, 895-912 (1985). On the other hand, the Court has held that laws that advance a racially neutral purpose are not subject to constitutional challenge on the ground that they have a "racially discriminatory" effect. Robert A. Sedler, *The Constitution and the Consequences of the Social History of Racism,* 40 ARK. L. REV. 677, 687-96 (1987). By so holding, the Court has severely limited the circumstances in which racial minorities can mount a successful constitutional challenge to laws and governmental actions that have the foreseeable effect of disadvantaging racial minorities. *See id.* at 687-96; Washington v. Davis, 426 U.S. 229 (1976).

54. *See infra* notes 109-11 and accompanying text.

the obligation of educating parochial school children. In this situation, it is not possible to say which effect is "primary." Government financial aid to the parochial schools advances both effects in equal measure. The question then becomes whether such aid is unconstitutional, and the Court has held that direct aid to parochial schools, as opposed to aid to students attending parochial schools and their parents, is unconstitutional.[55]

Because this is so, in applying the "advancing or inhibiting religion" principle, the Court necessarily had to develop subsidiary doctrines that assist in determining whether a particular governmental involvement has the effect of "advancing or inhibiting religion." The Court's precedents in the different areas of Establishment Clause litigation also influence the Court's determination of this question. While the Court expressly applies the "advancing or inhibiting religion" principle in many Establishment Clause cases, in only a limited number of cases will the principle itself be a useful analytical tool in enabling the Court to resolve the particular Establishment Clause issue before it. The result in most of the "advancing or inhibiting religion" cases then will depend on the Court's application of subsidiary doctrines and relevant precedents to determine whether the particular governmental action has the primary effect of "advancing or inhibiting religion."

3. The "Excessive Entanglement" Principle

Under this principle, governmental action that fosters "excessive entanglement" with religion violates the Establishment Clause. The "excessive entanglement" principle originated in older cases involving controversies between church officials and disputes over church property. In those cases, the Court held that the Establishment Clause precluded the civil courts from becoming involved with matters of religious doctrine or policy and that the courts must defer to the resolution of those issues by the highest tribunal of a hierarchical church authority.[56] The "excessive entanglement" principle in its current form was articulated and applied by the Court in *Lemon* to hold unconstitutional a state program supplementing the salaries of parochial school teachers of secular subjects.[57] To ensure that the teachers receiving the supplements taught only secular subjects, the state imposed restrictions on the teachers and required the submission of financial data

55. *See infra* notes 128-36 and accompanying text.

56. *See, e.g.*, Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929); Watson v. Jones, 80 U.S. 679 (1871).

57. *See* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

and the examination of school records.[58] The continuing state surveillance of the parochial schools under the program was held to violate the Establishment Clause because it would result in an "excessive and enduring entanglement between state and church."[59]

The result in *Lemon* reflects an interaction between the "advancing or inhibiting religion" principle and the "excessive entanglement" principle. The salary supplement program invalidated on "excessive entanglement" grounds in *Lemon* included the monitoring features in an effort to avoid the invalidation of the program under the "advancing or inhibiting religion" principle. Supplementing the salaries of parochial school teachers of secular subjects obviously would have the effect of "advancing religion" unless the state could ensure that these teachers would not include any religious teaching in their classes. However, the monitoring provisions by their very nature rendered the program violative of the "excessive entanglement principle," and so the program was unconstitutional.[60]

> In more recent years, religious organizations have invoked the "excessive entanglement" principle, along with the Free Exercise Clause, to obtain a constitutionally-required exemption from governmental regulation that is claimed to interfere improperly

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58. *See id.* at 619-21.

59. *Id.* at 619.

60. In *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970), decided one year prior to *Lemon*, the Court appeared to apply the "excessive entanglement" principle "in reverse," so to speak, to uphold against Establishment Clause challenge the inclusion of property used for religious purposes in a general property tax exemption for non-profit institutions. The Court noted that the inclusion of property used for religious purposes in the general tax exemption promoted "benevolent neutrality" toward religion and avoided the "entanglement" problems that could result from governmental valuation of church property for tax purposes and enforcement of the tax against church property. *See id.* at 669. In retrospect, however, it is clear that the basis of the Court's holding in *Walz* was "benevolent neutrality" rather than "non-entanglement." As will be discussed subsequently, the result in *Walz* was based on the Court's application of the subsidiary doctrine of the non-discriminatory inclusion of religion. *Id.* at 690. Under this doctrine, the government may, in at least some circumstances, include the religious with the secular in the receipt of governmental benefits; in *Walz*, the Court held that this applied to property tax exemptions for non-profit institutions. *Id.* at 681. The "entanglement" that was avoided by exempting church property from the tax would not justify an exemption for church property alone, and this would be unconstitutional as a preference for religion over non-religion. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (holding an exemption from the state sales tax law for religious periodicals alone violative of the Establishment Clause). In other words, the property tax exemption in *Walz* did not violate the Establishment Clause because it was included in a property tax exemption for all non-profit institutions. The avoidance of "entanglement" problems by the exemption, in retrospect, was not necessary to the decision and would not justify an exemption for church property alone. *See also infra* notes 201-11 and accompanying text.

> with their religious operations. In this circumstance, the application of the "excessive entanglement" principle seems to focus more on the extent of governmental oversight of religious matters, while the Free Exercise claim seems to focus more on the extent to which the particular regulation interferes with the ability of the religious organization to carry out its religious purpose. In resolving the constitutional question in the particular case, the Court is likely to [consider] both elements . . . and to base its decision on both clauses.[61]

C. Subsidiary Doctrines

> A number of subsidiary doctrines have emerged from the Court's Establishment Clause decisions over the years. Some of these doctrines, such as "endorsement/symbolic union," have been articulated and expressly applied by the Court. Others, such as "accommodation for religious freedom," represent my explanation of results that the Court has reached in a number of Establishment Clause cases. However derived or explained, these doctrines, which sometimes overlap or interact, are in fact applied by the Court in actual cases, and so comprise an element of the "law of the Establishment Clause." As stated previously, in practice the Court uses these subsidiary doctrines to determine whether or not a particular governmental involvement with religion amounts to "advancing or inhibiting religion," and if so, invalidates the action under that principle.[62]

The Court's Establishment Clause decisions in the sixteen years since the publication of the earlier article involved these subsidiary doctrines along with the precedents discussed in the next section.

1. Primary Effect and Incidental Benefit

When the primary effect of a governmental action is to advance a secular purpose, that action does not violate the Establishment Clause merely because it provides an "incidental benefit" to religion. This subsidiary doctrine relates directly to defining the meaning of the "advancing or inhibiting religion" principle. The crucial question in each case is whether the governmental action effectively advances a secular

61. Sedler, *supra* note 1, at 1350-51. This is what the Court did in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012); *see also supra* note 19.

62. Sedler, *supra* note 1, at 1351.

purpose and provides no more than an "incidental benefit" to religion. Obviously, whether the governmental action provides no more than an "incidental benefit" to religion is a matter of degree, and the Court must weigh the government's interest in advancing the secular purpose by the means chosen against the resulting "benefit" to religion.

The Court articulated this subsidiary doctrine and applied it in the pre-*Lemon* case of *McGowan v. Maryland*,[63] in which it upheld the constitutionality of a then current and now long obsolete state "Sunday closing" law requiring most businesses to close on Sunday. The Court justified the law on the ground that regardless of its historic religiously-based origin, it now provided for a uniform day of rest and, therefore, had a secular purpose within the meaning of the first *Lemon* principle.[64] Because the law effectively advanced that secular purpose—the great majority of employees would have Sunday off from work—the Court concluded that the law did not have the effect of "advancing religion," notwithstanding that the choice of that day coincided with the Christian Sabbath and therefore provided an "incidental benefit" to religion.[65] The "primary effect and incidental benefit" doctrine also explains why it is constitutionally permissible for the government to include religious institutions as recipients of governmental funding to provide secular services. Providing funding to these organizations effectively advances the secular purpose for which the funding is provided, and, consequently, any "incidental benefit" for the religious mission of these organizations from the funding is deemed tolerable.[66] Finally, this doctrine explains, at least in retrospect, why it is constitutionally permissible for the state to provide certain benefits, such as bus transportation and secular textbooks, to parochial school students. The provision of bus transportation, for example, advances the secular purpose of getting children to school safely, and because this is so, the Establishment Clause has been held to tolerate this "incidental benefit" to the parochial schools.[67] Again, the point to be emphasized is that the determination of the constitutional question depends on whether the effect of the law is primarily secular. If it is, the law is constitutional notwithstanding that it may provide an incidental benefit to religion.

63. 366 U.S. 420 (1961).
64. *Id.* at 450.
65 *Id.*
66. *See infra* notes 123-27 and accompanying text.
67. *See infra* notes 128-32 and accompanying text.

2. Secular Deism

Proponents of a narrow or "accommodationist" interpretation of the Establishment Clause sometimes draw an analogy to the references to God in governmental ceremonies and activities, such as the reference to "One Nation Under God" in the official Pledge of Allegiance; the national motto of "In God We Trust" placed on American currency, official documents, and public buildings; and the traditional opening of federal court sessions with "God Save the United States and this Honorable Court." They also cite the fact that historically religious holidays such as Thanksgiving and Christmas are celebrated today as national holidays. Therefore, they argue by analogy that because these practices assumedly do not violate the Establishment Clause, other governmental involvements with religion, such as a display of a nativity scene on public property, do not violate the Establishment Clause either.[68]

"The definitive answer to this argument by analogy lies in the doctrine of secular deism. These official references to God and related practices do not violate the Establishment Clause because, through long usage in a secular context, they have lost their religious significance."[69] Because they have lost their religious significance, they do not have the effect of advancing religion and, therefore, do not violate the second *Lemon* principle. As Justice Douglas noted many years ago, "We are a religious people whose institutions presuppose a Supreme Being."[70] Precisely because this has been so, it should not be surprising that these practices have become a part of official life. For this reason, they are now deemed to have a secular meaning and are therefore constitutionally unobjectionable. Furthermore, whatever religious significance Thanksgiving and Christmas may retain, it cannot seriously be questioned that they are celebrated by large segments of the public as

68. Chief Justice Burger appeared to be advancing this argument to some extent in *Lynch v. Donnelly*, 465 U.S. 668 (1984). However, it was not the basis of the Court's decision in that case or in subsequent cases applying *Lynch* to uphold the constitutionality of religious symbols in primarily secular displays. *See infra* notes 223-29 and accompanying text.

69. Sedler, *supra* note 1, at 1353. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (Brennan, J., concurring). Justice Brennan has referred to these practices as having been "interwoven . . . so deeply into the fabric of our civil polity that [their] present use may well not present that type of involvement which the First Amendment prohibits." *Id.* at 303; *see also* Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 632-33 (1989) (O'Connor, J., concurring) (referencing Justice Blackmun's discussion of this point); CHOPER, *supra* note 5, at 108-12 (discussing the "American Civil Religion," referring to "secular political statements that fall within the category of 'widely shared and basically noncontroversial public values'").

70. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

secular holidays. Thanksgiving is about family reunions, turkey dinners, and football. Christmas is the national holiday of gift giving. The doctrine of secular deism means, then, that these official references to God and the celebration of secular holidays that have a religious origin do not violate the Establishment Clause.[71] It also means that the argument by analogy to support a narrow or "accommodationist" interpretation of the Establishment Clause is structurally unsound.

3. Endorsement/Symbolic Union

Under this subsidiary doctrine, governmental action violates the Establishment Clause when it would be perceived by an objective observer as constituting a governmental endorsement of religion or as creating a symbolic union between government and religion. When governmental action would be perceived in this manner, it has the effect of advancing religion and therefore violates the second *Lemon* principle.

The endorsement/symbolic union doctrine provides a doctrinal explanation of why the display of an unadorned nativity scene on public

71. The view expressed in the earlier article that the reference to "One Nation Under God" in the official Pledge of Allegiance is an example of secular deism, and the holding of the Seventh Circuit in *Sherman* that this reference to God in the Pledge did not constitute an impermissible religious prayer was challenged by the holding of the Ninth Circuit in *Newdow v. Elk Grove School District*, 328 F.3d 466 (9th Cir. 2002), *rev'd*, 542 U.S. 1 (2004), to the effect that the recitation of the Pledge with this reference to God by a public school teacher leading the prayer constituted an impermissible establishment of religion by the school district. The Supreme Court avoided dealing with the constitutional question by holding that the non-custodial parent who brought the suit lacked standing when the custodial parent did not object to this recitation. *Newdow*, 542 U.S. 1, 16-17 (2004). Chief Justice Rehnquist and Justices O'Connor and Thomas disagreed with the standing holding and took the position that the reference to God in the Pledge did not constitute an impermissible establishment of religion. *Id.* at 18 (Rehnquist, J., concurring). Justice O'Connor's concurrence invoked what I have referred to as secular deism. *See id.* at 36-37 (O'Connor, J., concurring). She stated as follows:

> There are no *de minimis* violations of the Constitution–no constitutional [violations] so slight that the courts are obliged to ignore them. Given the values that the *Establishment Clause* was meant to serve, however, I believe that the government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

Id. at 36-37 (O'Connor, J., concurring) (citation omitted).

property is unconstitutional,[72] while the inclusion of a nativity scene as a part of a larger holiday season display is not.[73] The Court found that the former display constituted an endorsement of Christianity while the latter did not.[74] While this distinction may appear somewhat questionable, it clearly illustrates the operation of the endorsement/symbolic union doctrine in practice. The Court has also applied this doctrine to hold unconstitutional a grant to churches of a veto over the issuance of a liquor license in proximity to a church.[75]

4. Accommodation for Religious Freedom, But Not for Religion

An essential tenet of the "accommodationist" position is that the Establishment Clause should permit some accommodation for religion in public life.[76] Despite expressions of this view by some Justices in various

72. *See Cnty. of Allegheny,* 492 U.S. 573.

73. *See Lynch,* 465 U.S. 668.

74. *See Cnty. of Allegheny,* 492 U.S. at 574; *Lynch,* 465 U.S. at 668.

75. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). In *School District of Grand Rapids v. Ball,* 473 U.S. 373 (1985), and *Aguilar v. Felton,* 473 U.S. 402 (1985), the Court concluded that the presence of public school employees in a parochial school classroom amounted to a symbolic union between government and religion. On this basis, it held unconstitutional the use of public school employees to teach secular subjects or to provide remedial services to parochial school students in parochial school classrooms. In *Agostini v. Felton,* 521 U.S. 203, 234-35 (1997), the Court took the position that the presence of public school employees in a parochial school classroom, without more, does not "create the impression of a 'symbolic union' between church and state" and overruled the holdings in *Ball* and *Aguilar.*

76. This tenet was expressed forcefully by Ninth Circuit Judge Diarmuid O'Scannlain, reluctantly concurring in *Separation of Church & State Committee. v. City of Eugene,* 93 F.3d 617 (9th Cir. 1996), in which the Ninth Circuit held unconstitutional a city's display of a large Latin cross.

> [T]he Supreme Court in the last half-century has constructed and zealously policed a "wall of separation" between church and state that was unknown and, indeed, unthinkable at the time of the framing. . . .
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> . . . .
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> Further, the practices that were prevalent and accepted during the early history of this Nation lead to the conclusion that, even as to the national government, the Establishment Clause was not intended to erect a 'wall of separation' between church and state. Rather, the accommodation of religion was not only permitted but encouraged. For instance, our national government has, throughout its history, manifested an abiding belief in the value of prayer.

Id. at 620-22.

Professor Michael W. McConnell has carefully distinguished this view of "accommodation" from an "accommodation for religious freedom," which he strongly advocates.

> I must stress at the outset that this Article's conception of accommodation does not include government action that acknowledges or expresses the prevailing religious sentiments of the community such as the display of a religious symbol on public property or the delivery of a prayer at public ceremonial events. Such

contexts,[77] the Court has not upheld government action favoring religion on the ground that it reflected a permissible "accommodation" for religion. Thus, in *Estate of Thornton v. Caldor, Inc.*,[78] the Court held unconstitutional a law that entitled an employee to take off work on the day that the employee observed as the Sabbath. The effect of the law was to advance religion because the only employees who could choose a day off were employees who wanted to observe a day as their Sabbath.[79] For the Court to have held that it was constitutionally permissible for the government to make an "accommodation" for religion would be inconsistent with the overriding Establishment Clause principle of complete official neutrality toward religion, since the effect of such an "accommodation" would be to prefer religion over non-religion.

The overriding principle of complete official neutrality toward religion, however, has not been seen by the Court as precluding the government from taking action in some circumstances to protect the religious freedom of individuals and religious institutions. It is here that the Court's interpretation of the Establishment Clause takes account of the Free Exercise Clause and the common purpose of both clauses to secure religious freedom. The doctrine that has emerged from the Court's decisions in this area is that the government may take action that is precisely tailored to protect the religious freedom of individuals and religious institutions. It is for this reason that the Establishment Clause is not violated by Title VII's religious employee exemption for religious institutions,[80] or its requirement that an employer make a reasonable accommodation for an employee's religious beliefs.[81] Likewise, an exemption from military service limited to those whose opposition to war is based on religious or moral beliefs, as opposed to political beliefs, has been assumed to be consistent with the Establishment Clause.[82] The same is true of an exemption for sacramental wine during Prohibition and for the use of peyote in the religious ceremonies of the Native-American church.[83] Finally, in the more recent case of *Cutter v. Wilkinson*,[84] the

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acknowledgments do not leave the decision about religious practice to the individual or group, but rather serve as a social or collective expression of religious ideas.

McConnell, *supra* note 5, at 687.

77. *See, e.g.*, *Lynch*, 465 U.S. at 673-78 (Burger, C.J.).

78. 472 U.S. 703 (1985).

79. *Id.* at 709-11.

80. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

81. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); *see also infra* notes 357-61 and accompanying text.

82. *See* Sedler, *supra* note 1, at 1432-33 n.418.

83. *See infra* notes 364-68 and accompanying text.

84. Cutter v. Wilkinson, 544 U.S. 709 (2005).

Court held that the Establishment Clause was not violated by the application of a provision of federal law that was interpreted as requiring prison officials to take action to accommodate inmates' religious practices.

5. The Non-Discriminatory Inclusion of Religion

Because the overriding principle of the Establishment Clause is one of complete official neutrality toward religion, the Establishment Clause does not require that the government be hostile to religion. As discussed earlier, this means that the government can include religious institutions in the services it provides to the public generally, such as police and fire protection; it can include religious institutions that provide secular services as recipients of governmental funding; and it can provide religious organizations with equal access to governmental facilities.[85] The Court, however, has gone further and has held that, at least in some circumstances, the government does not violate the Establishment Clause when it includes the religious with the secular in the receipt of governmental benefits. Under this doctrine, the Court has held that the Establishment Clause is not violated by tax exemptions for religious, charitable, and educational organizations[86] or by allowing parents to take tax deductions for educational expenses, notwithstanding that most of these deductions are taken for tuition payments made by parents who are sending their children to parochial schools.[87] The non-discriminatory inclusion of religion doctrine was also the basis for the Court's holding that it was constitutionally permissible for a blind student to use state payments provided to such students for educational purposes to attend a religiously-affiliated college for the purpose of pursuing a religious vocation.[88] Finally, this doctrine was the basis for two of the Court's most important Establishment Clause decisions in the post-1997 period. The Court upheld against Establishment Clause challenge a program in which parochial school students were included with public school students in the loan of computers and other instructional materials[89] and a program in which vouchers for tuition at parochial schools were included with other financial assistance for the parents of children attending underperforming public schools.[90]

85. *See supra* notes 27-30 and accompanying text.

86. Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970).

87. Mueller v. Allen, 463 U.S. 388 (1983).

88. Winters v. Wash. Dep't. of Servs. for the Blind, 474 U.S. 481 (1986).

89. Mitchell v. Helms, 530 U.S. 793 (2000).

90. Zelman v. Simmons-Harris, 536 U.S. 639 (2002). See Eugene Volokh, *Equal Treatment is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 365-73 (1999), for an argument to the effect that not only may the government include parochial

While it may be possible to identify other subsidiary doctrines from the Court's Establishment Clause decisions, these subsidiary doctrines are most frequently applied in practice. As stated above, in practice, these subsidiary doctrines relate primarily to determining whether or not a particular governmental involvement with religion amounts to "advancing or inhibiting religion" and so would be invalid under the second *Lemon* principle.

D. The Precedents[91]

In actual Establishment Clause litigation, lawyers and judges are not likely to approach the Establishment Clause as an undifferentiated whole. Rather, they are likely to approach it in terms of different areas of Establishment Clause law and to focus on the applicable precedents in each of the different areas. The precedents are more important than the operational principles and subsidiary doctrines, discussed previously, because they are more directly relevant to the analysis of the particular governmental action that is at issue. The Court's precedents have been the primary factor in the development of each of the different areas of Establishment Clause law. Nowhere is this phenomenon more evident than in the area of aid to parochial schools. Aid to parochial schools first came before the Court in *Everson v. Board of Education*,[92] which is also the seminal case in the development of the Court's modern Establishment Clause jurisprudence. At issue in that case was the constitutionality of New Jersey's policy that reimbursed parochial schools for the cost of student bus transportation. A sharply divided Court held, 5-4, that the state's provision of bus transportation for parochial school students did not violate the Establishment Clause.[93]

In setting forth the "classic meaning" of the Establishment Clause in *Everson*, Justice Black stated, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice

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schools in aid programs, but if it chooses to include private schools in a governmental aid program, it may not constitutionally exclude religious schools.

However, thirty-nine states have state constitutional "no aid" provisions that preclude the use of state funds for the support of sectarian or denominational schools, and these and related provisions have been interpreted by state courts as prohibiting voucher programs that include vouchers for attendance at parochial schools. *See infra* notes 192-99 and accompanying text.

91. In our discussion of the precedents, we will be including some cases that have discussed "The Operational Principles" and "Subsidiary Doctrines." The author has concluded that this "repeat discussion" is necessary to maintain continuity and completeness.

92. 330 U.S. 1 (1947).

93. *See id.* at 18.

religion."[94] However, the Court had held many years before *Everson* that the Establishment Clause was not violated by a governmental grant of funds to a religiously-affiliated institution, such as a hospital, in order to enable it to provide secular services.[95] It is obvious that in a parochial school, there is a complete admixture of the secular and the religious. Parochial schools provide children with instruction in the secular subjects, but they do so from a completely religious perspective, which is why those parents who choose to send their children to parochial schools do so.

To the dissenting Justices in *Everson*, the admixture of the secular with the religious in parochial schools precluded any form of governmental aid to parochial schools because such aid would inevitably advance the schools' religious function.[96] The majority did not dispute this point but avoided its implications by drawing a distinction between aid to the school, which was constitutionally impermissible, and aid to the child, which the majority said was permissible. Because the provision of bus transportation to the parochial school was considered aid to the child and advanced the state's important interest in securing the child's safety, the majority concluded that transportation assistance did not violate the Establishment Clause.[97]

Constitutional law, as previously noted, develops in a line of growth. Under the *Everson* precedent, it is constitutionally permissible for the state to provide aid to the child, notwithstanding that its provision of such aid would also result in some "incidental" benefit to the parochial school. Taking their cue from *Everson*, in the years following, some states tried to assist parochial schools in meeting the increasing expenses of educating their students by providing benefits in the form of "aid to the child." Applying the *Everson* precedent, the Court held that a state could loan parochial school students the same textbooks for secular subjects that it loaned to public school students.[98] The Court also held that states could provide diagnostic services through which state employees tested individual children for particular health and educational problems in the parochial schools.[99] In more recent years, the Court has expanded the concept of "aid to the child," upholding, for example, a program that lent computers and other instructional materials to parochial school students as well as to public school students.[100] The

94. *Id.* at 16.
95. Bradfield v. Roberts, 175 U.S. 291 (1899).
96. *See Everson*, 330 U.S. at 49-53 (Rutledge, J., dissenting).
97. *Id.* at 16-18.
98. *See* Bd. of Educ. v. Allen, 392 U.S. 236 (1968).
99. *See* Wolman v. Walter, 433 U.S. 229, 241-44 (1977).
100. *See infra* notes 143-159 and accompanying text.

Court has also made it possible for the state to aid parochial schools by characterizing some forms of government assistance to parochial schools—such as the inclusion of parochial school vouchers in an assistance program for low-income parents of children attending parochial schools—as a form of parental choice that did not violate the Establishment Clause.[101]

What the *Everson* precedent does is to preclude the state from providing any form of direct aid to the parochial schools themselves, such as subsidizing the salaries of parochial school teachers or giving grants for the construction of buildings at parochial schools, because this form of aid would advance the religious purpose of the schools.[102] Thus, whenever a state undertook to provide some form of assistance to parochial schools, the analysis of the constitutional issue depended on whether the court characterized the particular form of assistance as "aid to the child" or "aid to the school." Although the Court had held that the loan of textbooks was constitutionally permissible "aid to the child," the Court had also held that the loan of instructional materials, such as recording equipment, laboratory equipment, and maps, fell on the side of "aid to the school" and thus was constitutionally impermissible.[103] The Court has since departed from that holding and, in an effort to bring computers in line with textbooks, has held that the state can loan computers and other instructional materials to parochial school students so long as the program establishes adequate standards to prevent computers and instructional materials from being diverted for religious purposes.[104] What this means, in light of the *Everson* precedent, is that with adequate standards to prevent divertibility, any program of instructional aid falls on the side of "aid to the child" and so is constitutionally permissible. The *Everson* precedent remains viable, and its effect is to allow state assistance for parochial school education only when the particular form of assistance is held to fall on the side of "aid to

101. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); *see also infra* notes 167-74 and accompanying text.

102. In *Lemon* itself, an effort to avoid this part of the *Everson* precedent, by state supplementation of the salaries of teachers of secular subjects in parochial schools, foundered on the "excessive entanglement" principle. Lemon v. Kurtzman, 403 U.S. 602, 620-22, 624-25 (1971). The supplementation was constitutionally impermissible because the program also provided for state monitoring of the teaching of secular subjects in order to ensure that the teaching was free of religious content. *Id.* But even if the program had not provided for state monitoring, it would have been unconstitutional under the second religious effect *Lemon* prong, because it took the form of a direct financial subsidy to the parochial school, enabling it to carry out its religious purpose more effectively.

103. *See Wolman*, 433 U.S. at 248-51.

104. *See infra* notes 144-50 and accompanying text.

the child" rather than "aid to the school."[105] The *Everson* precedent and its impact on determining the constitutionality of aid to parochial education illustrates the importance of precedent in the structure of the "law of the Establishment Clause."[106]

I see Establishment Clause litigation, and thus the Court's Establishment Clause precedents, as falling into five general areas: (1) religious practices in the public schools; (2) financial aid and governmental benefits to religion; (3) governmental action purportedly "advancing religion"; (4) entanglement and governmental interference in religious matters; and (5) preference for religion or between religions, which includes actions designed to protect the religious freedom of individuals and religious institutions. The discussion of the application of the "law of the Establishment Clause" in the next part of this Article will be organized into these five areas.

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105. In practice, especially in more recent years, the Court has managed to uphold the particular form of aid as constitutionally permissible "aid to the child" or constitutionally permissible "parental choice." *See supra* notes 100-104 and accompanying text. In *Zobrest v. Catalina School District*, 509 U.S. 1 (1993), a sharply divided Court held, 5-4, that when a school district provided sign language interpreters for hearing impaired students in the public schools, the Establishment Clause did not preclude it from providing a sign language interpreter for a hearing impaired student who transferred to a parochial school. And in *Agostini v. Felton*, 521 U.S. 503 (1997), the Court, again sharply divided, held, 5-4, that remedial instructional programs for low-income students could be provided to parochial school students in parochial school classrooms and that public teachers could teach secular "enrichment courses" in the parochial schools. These cases coupled the two post-1997 aid to parochial education cases. *See* Mitchell v. Helms, 530 U.S. 793 (2000); *Zelman*, 536 U.S. 639. These cases indicate that the Court is disposed to uphold most forms of aid to parochial education by bringing them within the ambit of "aid to the child" or the ambit of "parental choice." *See infra* notes 144-200 and accompanying text.

106. In the original article, I suggested that the Court could have resolved the constitutional issue in *Everson* differently. *See* Sedler, *supra* note 1, at 1362-64. Because there is a complete admixture of the secular and the religious in parochial schools, the Court could have held that under its precedents permitting the government to grant funds to a religiously affiliated institution in order to enable it to provide secular services, the state could give aid to parochial schools by a reasonable apportionment formula. *Id.* This would result in the state receiving approximately half of the amount of funds for the same activity as the state provided for public schools. *Id.* Under this precedent, the bus transportation program in *Everson* would violate the Establishment Clause because it was not apportioned. *See id.* However, the state could generally provide a great deal of aid to parochial schools under a reasonable apportionment formula. *See id.* But this was not the holding of *Everson*, which was based on the constitutional permissibility of "aid to the child." *Id.*

III. THE APPLICATION OF THE "LAW OF THE ESTABLISHMENT CLAUSE"

This part of the Article repeats in highly summarized form much of the comparable part of the original article. I said in the original article that that part of the article would read somewhat like a "restatement," in which I discussed the results that the Supreme Court had reached in its application of the "law of the Establishment Clause" in the five major areas of Establishment Clause litigation. I said that I hoped to demonstrate that most of the major questions arising under the Establishment Clause had by then been settled and that much of Establishment Clause litigation in the future would involve issues that generally could be resolved by the application of the relevant Supreme Court principles, doctrines, and precedents.[107]

In the present article, I will incorporate the seven Supreme Court Establishment Clause cases decided by the Court since 1997 into the discussion of the application of the "law of the Establishment Clause." While some of these cases may have had important political implications, such as the decision on the constitutional permissibility of including parochial school vouchers in a program to help children attending failing inner city schools,[108] the cases generally involved the application of the "law of the Establishment Clause" to particular factual situations. The cases did not break new ground, and the "law of the Establishment Clause" has not changed significantly from what it was at the time of the original article. We now turn to the five major areas of Establishment Clause litigation.

A. Religious Practices in the Public Schools

By the time of the original article, the Supreme Court had declared unconstitutional all state-sponsored religious practices in the public schools, such as school-sponsored prayer (both in the classroom and at commencement),[109] Bible reading,[110] and posting a copy of the Ten Commandments in public school classrooms.[111] The Court had also declared unconstitutional a state law prohibiting the teaching of evolution in the public schools[112] and a state law requiring the teaching

107. Sedler, *supra* note 1, at 1364-65.

108. *See Zelman*, 536 U.S. at 639.

109. *See* Engel v. Vitale, 370 U.S. 421 (1962); *see also* Lee v. Weisman, 505 U.S. 577 (1992). In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court found that a state law "mandating a moment of silence" was adopted for the purpose of encouraging school prayer and thus held that it was unconstitutional as violating the first *Lemon* prong.

110. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

111. *See* Stone v. Graham, 449 U.S. 39 (1980).

112. *See* Epperson v. Ark., 393 U.S. 97 (1968).

of "creation science" in addition to evolution, based on a factual finding that "creation science" was not science but religion masquerading as science.[113] The most recent attempt to undermine the teaching of evolution in some school districts has been to counter evolution with "intelligent design," which is purportedly an alternative "scientific" explanation of the origin of human life. In the one "intelligent design" case coming before a federal court, the court held an extensive evidentiary hearing and made comprehensive findings to the effect that, like "creation science," "intelligent design" was not science but religion masquerading as science so that the teaching of "intelligent design" in the public schools violated the Establishment Clause. The decision appears to have brought to an end the effort to counter evolution with "intelligent design."[114]

In the intervening years, the Supreme Court decided one case dealing with religious practices in the public schools. In *Santa Fe Independent School District v. Doe*,[115] the Court held that a public school's policy, which allowed students to choose whether a "statement or invocation" would be a part of pre-game ceremonies of home varsity football games

113. *See* Edwards v. Aguillard, 482 U.S. 578 (1987).

114. *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005). The effect of the district court's decision was to ban the teaching of "intelligent design" as effectively as if the Supreme Court had rendered the decision. The findings were not only comprehensive but so strongly supported by expert scientific testimony as to be unassailable. Any school district motivated to try to put "intelligent design" into the curriculum would be advised by the school board attorney that the district would be sued in federal court and the federal judge, relying on the findings in the *Dover* case, would hold the practice to be violative of the Establishment Clause.

In *Tangipahoa Parish Board of Education v. Freiler*, 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000), a school board adopted a resolution that required the teaching of evolution in the schools to be accompanied by a disclaimer to the effect that "'the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.'" *Id.* at 341. It went on to state that "[s]tudents are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion." *Id.* The Fifth Circuit found that the disclaimer violated the second *Lemon* principle because its primary effect was to "maintain a particular religious viewpoint, namely belief in the Biblical version of creation." *Id.* at 346-48. The Supreme Court denied certiorari over the dissent of Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, who maintained that the disclaimer was sufficiently neutral and had the secular effect of advancing freedom of thought. *Freiler*, 530 U.S. at 1251 (Scalia, J., dissenting from denial of certiorari).

115. 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (stating the opinion of Chief Justice Rehnquist and Justices Scalia and Thomas, who dissented on the ground that the Court should not have declared the policy unconstitutional on its face before it had been put into practice).

and, if so, to elect a student from student volunteers to deliver the statement or invocation," constituted school sponsorship of a religious message and so violated the Establishment Clause. The Court found that the policy would appear to an objective observer as school endorsement of student prayer and "has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."[116] The decision there continues the line of cases, holding that all state-sponsored religious practices in the public schools, including prayers at commencement and at athletic events, violate the Establishment Clause.[117]

B. Financial Aid and Benefits to Religion

The cases in this area involve the question of whether the government may, consistent with the Establishment Clause, provide financial aid or other benefits of a financial nature to religious institutions or to individuals who use them for a religious purpose. In *Everson*, Justice Black stated a core meaning of the Establishment Clause: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[118] Professor Jesse Choper has observed, "There is broad consensus that a central threat to the religious freedom of individuals and groups—indeed, in the judgment of many, 'the most serious infringement upon religious liberty'—is posed by 'forcing them to pay taxes in support of a religious establishment or religious activities.'"[119] Nevertheless, it is abundantly clear that every form of financial aid or other benefits of a financial nature provided by the government to "religion" does not violate the Establishment Clause. In *Everson* itself, the Court held that the state did not violate the Establishment Clause by providing free bus transportation for parochial school students.[120] Justice Douglas' observation that the Establishment Clause "does not say that in every and all respects there shall be a separation of Church and State . . . [but] [r]ather, it studiously

116. *Id.* at 317.

117. The Fifth Circuit has held that it is constitutionally permissible for a public high school to permit nonsectarian prayer at commencement if the decision to have prayer is made by the students themselves rather than by the school official. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992). The Third Circuit reached a contrary result. ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d. Cir. 1996). The Supreme Court has not dealt with this specific question. *See* Sedler, supra note 1, at 1369-72.

118. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15-16 (1947).

119. CHOPER, *supra* note 5, at 16.

120. *Everson*, 330 U.S. at 17.

defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other,"[121] is a particularly apt description of the constitutional permissibility of governmental financial aid or benefits to religion. Broadly speaking, the constitutional result depends on the purpose for which the financial aid or benefit is given, the particular form that the aid or benefit takes, and whether, in the circumstances presented, the aid or benefit creates a preference for religion over non-religion. And in recent years, as reflected in the Court's last two decisions involving financial aid to religion,[122] a Court majority managed to uphold the particular form of financial aid that was at issue in those cases. The trend is toward upholding forms of financial aid that are provided equally to the "religious" and the "secular" so long as the aid is used to advance a secular purpose. Looking to the Supreme Court's precedents in this area, it is helpful to divide the cases into three categories: (1) secular function, (2) aid to religious schools and students, and (3) equal treatment of religion.

1. Secular Function

Most clearly, the government does not violate the Establishment Clause when it provides financial aid to a religious institution, such as a religiously affiliated hospital, to enable that institution to perform a secular function. The funding has a secular purpose (the first *Lemon* principle) and does not have the primary effect of advancing religion (the second *Lemon* principle), and so the funding does not violate the Establishment Clause.[123] The Court will also assume that the religious institution will carry out the secular function "in a lawful, secular manner" and will not use the funding to achieve religious objectives.[124]

121. Zorach v. Clauson, 343 U.S. 306, 312 (1952).

122. Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 539 U.S. 639 (2002).

123. In what appears to be the first Establishment Clause case to come before the Supreme Court, the Court saw no possible Establishment Clause objection to Congress providing funding to a Washington, D.C., charitable hospital that was operated by a religious order. Bradfield v. Roberts, 175 U.S. 291 (1899). The funding was provided pursuant to a contractual arrangement by which the hospital agreed to devote two-thirds of its patient capacity for indigent District of Columbia residents. *Id.* Because the hospital essentially operated like any other hospital and performed a secular function, the Establishment Clause was no obstacle to the federal government's contracting with the hospital with regard to its performance of that secular function. *Id.*

124. *See* Bowen v. Kendrick, 487 U.S. 589 (1988). In *Bowen*, the Court held that the government could include a religiously-affiliated organization in a program of grants to private organizations to provide counseling for the prevention of adolescent sexual relations and care for pregnant adolescents and adolescent parents, and the Court would not presume that the organizations would use the grants to advance their religious views

The proposition that the government can provide funding to religiously affiliated institutions in order to enable them to perform a secular function has been relied on by the Supreme Court to uphold federal assistance to church-affiliated colleges and universities. Crucial to this holding was the Court's "constitutional finding of fact" that most church-affiliated colleges and universities are sufficiently similar to secular colleges and universities in their educational operation, so that providing them with governmental funding will not have the effect of "advancing religion." Nonetheless, the particular funding program involved in these cases did not take the form of a general grant to the institution, but it was targeted for specific secular purposes and was upheld on that basis.[125] Where a church-affiliated college or university operates a distinctly sectarian program, such as a divinity school, an unrestricted grant would presumably violate the Establishment Clause because it would have the effect of supporting, to some degree, the institution's sectarian program. In addition, where a particular church-affiliated college or university is found by a court to be a primarily sectarian institution, any governmental aid to that institution, of course, violates the Establishment Clause.[126]

2. Aid to Religious Schools

In a religious school, commonly referred to as a parochial or sectarian school, there is a complete admixture of the religious and the secular. While parochial schools provide children with instruction in the secular subjects, they designedly do so from a religious perspective. This is precisely why parents choose to send their children to such schools. Thus, it is not possible for the government to target funds to the parochial

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on adolescent sexual relations. If opponents of the grant could make such a showing, then the grant would have to be revoked.

125. *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976) (involving grants to defray part of expense of educating students in private colleges and universities, including grants to religiously-affiliated institutions that had given adequate assurance that funds would be used for a secular purpose); Hunt v. McNair, 413 U.S. 734 (1973) (involving state-issued revenue bonds that could be used by church-affiliated colleges and universities to borrow funds to finance construction of facilities used for secular purposes); Tilton v. Richardson, 403 U.S. 672 (1971) (involving federal construction grants to church-affiliated colleges and universities for buildings and facilities used exclusively for secular purposes). Because these church-affiliated colleges and universities are considered to be essentially secular institutions, there is no Establishment Clause problem when the government provides financial assistance to students attending such colleges. *See, e.g.*, Ams. United for Separation of Church & State v. Blanton, 433 F. Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977).

126. Habel v. Indus. Dev. Auth., 400 S.E.2d 516 (Va. 1991) (holding that Jerry Falwell's Liberty University was a sectarian institution so that the city's issuance of construction bonds for educational facilities at the university violated the Establishment Clause).

schools to be used exclusively for secular purposes, as it can do when it is providing funds for religiously affiliated colleges and universities. Because of the necessary admixture of the religious and secular in parochial school education, the Court's assumption in *Everson* was that any form of direct governmental aid to parochial schools would be unconstitutional, since it would advance the religious purpose of the schools.[127]

At the same time, the Court drew a constitutionally significant distinction between "aid to the school" and "aid to the child" and held that the Establishment Clause is not violated when the government funding takes the form of "aid to the child" who is attending the parochial school.[128] Once the Court drew this distinction, it was clear that a state's provision of free bus transportation to parochial school students in *Everson* fell on the side of "aid to the child" and so was constitutionally permissible. Applying the *Everson* precedent, the Court has held that a state could constitutionally provide parochial school students with the same kinds of individual-based benefits that it provides to public school students, such as loaning the parochial school students the same textbooks in secular subjects that it loaned to public school students;[129] providing diagnostic services in which state employees would go into the parochial schools to test individual children for particular health and educational problems;[130] providing a sign language interpreter for a hearing-impaired student at a parochial school when it provided a sign language interpreter for hearing-impaired students in the public schools;[131] and providing remedial instructional services for low-income students in parochial school buildings.[132]

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127. Everson v. Bd. of Educ., 330 U.S. 1, 14-16 (1947).

128. *See supra* notes 96-106 and accompanying text. While this distinction has been criticized by some academic commentators as focusing on the form of aid rather than on its substance and effect, *see, e.g.*, William P. Marshall, *Toward a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243, 246-47 (1989), it has been consistently applied and never questioned by the Court.

129. Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

130. *See* Wolman v. Walter, 433 U.S. 229 (1977); *see also* Lemon v. Kurtzman, 403 U.S. 610, 616 (1971) (discussing the provision of school lunches to parochial school students). Providing individualized services or school lunches or immunizations to parochial school students in the parochial schools means only that the school is the conduit for the distribution of a governmental benefit to the children.

131. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

132. *See* Agostini v. Felton, 521 U.S. 203 (1997). The significance of *Agostini* in this regard was that the Court had previously held that the remedial instructional services could not be provided in the parochial school itself because of concerns that doing so would create an impermissible "symbolic union" between the state and the parochial school. As a result, these remedial instructional services were provided off-premises, usually in mobile facilities parked on the parochial school grounds. These prior holdings

The Court has found that the particular funding came down on the side of "aid to the school" and thus was unconstitutional only when the state has granted funds directly to the parochial school, such as funds for the maintenance and repair of parochial school buildings;[133] has granted funds in the form of an unrestricted lump-sum grant, purportedly designed to reimburse the parochial schools for the expenses mandated by state law;[134] or, as in *Lemon* itself, has supplemented the salaries of parochial school teachers in secular subjects. The decision in *Lemon* was based on the excessive entanglement principle. In an effort to ensure that the teachers receiving the supplements were not including religious with secular instruction, the state imposed restrictions on the teachers and required the submission of data and the examination of school records. The program thus violated the Establishment Clause, because it would result in an "excessive and enduring entanglement between church and state."[135] However, a grant to pay the salaries of the parochial school teachers itself would necessarily fall on the side of "aid to the school" and so have the effect of advancing religion in violation of the second *Lemon* prong.[136]

In *Agostini v. Felton*,[137] the Court expanded on the "aid to the child" concept by upholding the constitutionality of a "shared time" program under which public school teachers went into the parochial schools and taught certain secular "enrichment" subjects that were designed to

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were overruled in *Agostini*. So long as public school employees provide the remedial instruction, they can do so in the parochial school building.

133. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

134. Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1977).

135. *Lemon*, 403 U.S. at 619.

136. The state was in effect caught in a "Catch 22" dilemma between the second and third *Lemon* prongs. *See also* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 CAL. L. REV. 5, 6 (1987). As Professor Choper explained,

> The Court began with a critical premise: the mission of church related elementary and secondary schools is to teach religion, and all subjects either are, or carry the potential of being, permeated with religion. Therefore, if the government were to help fund any subjects in these schools, the effect would aid religion unless public officials monitored the situation to see to it that those courses were not infused with religious doctrine. But if public officials did engage in adequate surveillance—this is the other horn of the dilemma—there would be excessive entanglement between government and religion, the image being government spies regularly or periodically sitting in the classes conducted in parochial schools.

Id. at 6.

137. *Agostini*, 521 U.S. 203, 234-35 (1997).

supplement the "core curriculum" of the parochial schools.[138] Precisely because the "shared time" program was supplemental to the "core curriculum" of the parochial school, the Court concluded that it would fall on the side of "aid to the child" rather than "aid to the parochial school."[139] The Court specifically found that the program did not impermissibly finance religious indoctrination by subsidizing the primary religious mission of the school.[140] Looking first to the Title I funds for remedial instruction, the Court pointed out that by law, Title I services were supplemental to the regular curricula and that no Title I funds ever reached the "coffers of religious schools."[141] Because the remedial services provided by the program did not supplant the remedial instruction and guidance counseling already provided by the parochial schools, they did not "relieve sectarian schools of costs they otherwise would have borne in educating their students" and did not "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination."[142] The same rationale would apply to the "supplemental secular instruction" provided under the "shared time" program.

The effect of *Agostini*, then, is to allow the state to provide remedial services and "supplemental secular instruction" to parochial school students in the parochial school buildings themselves. The Court in *Agostini* was careful to maintain the fundamental *Everson* distinction between constitutionally impermissible direct governmental financial aid to the parochial schools and constitutionally permissible aid to the child. While the Court said that governmental aid is not necessarily unconstitutional merely because it aids the educational function of the parochial schools, the Court also emphasized that the aid must be, in substance, aid to the child rather than aid to the school, that the aid must advance a clearly secular purpose that is supplemental to the religious purpose of the school, and that the aid cannot be so substantial or of such a nature as to create a significant financial incentive for parents to choose a parochial school education for their children.[143] Nonetheless, *Agostini* does represent an expanded definition of "aid to the child" and, to this extent, does permit the state to aid the educational function of parochial schools.

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138. *Id.* (overruling prior cases and holding that public school teachers providing remedial and "enrichment" instruction inside the parochial school buildings themselves did not violate the Establishment Clause).

139. *Id.* at 227-28.

140. *Id.* at 221.

141. *Id.* at 228.

142. *Id.* at 229-31.

143. *Agostini*, 521 U.S. at 226.

The expanded definition of "aid to the child" and the Court's willingness to uphold the state's aid to the educational function of the parochial schools through this vehicle came to the fore again in the 2000 case of *Mitchell v. Helms*.[144] In that case, the federal government distributed funds to state and local governmental agencies that, in turn, loaned educational materials and equipment such as library books and computer hardware and software to elementary schools, including private and parochial schools.[145] The funds could be used only to supplement funds from nonfederal sources, and the materials and equipment provided to the private and parochial schools had to be "secular, neutral and nonideological."[146] A private or parochial school seeking to obtain the funds had to submit an application to the local educational agency detailing which items the school was seeking and how it would use those items.[147] If the local agency approved the application, it would purchase the items from the school's application of funds and then lend them to the school.[148] The inclusion of parochial schools in the program was challenged as violative of the Establishment Clause.[149]

In a 6-3 decision, the Court held that the program did not violate the Establishment Clause.[150] There were three opinions in the case.[151] The plurality opinion, authored by Justice Thomas and joined in by Chief Justice Rehnquist and Justices Scalia and Kennedy, took the position that the program was constitutional, because it was neutral in that it was available to public, private, and parochial school students and was allocated on the basis of neutral, secular criteria that neither favored or disfavored religion.[152] The thrust of the plurality opinion was that the Establishment Clause permitted the government to give or lend to parochial school students the same materials and equipment that it gave or lent to public school students.[153] The plurality opinion specifically rejected the proposition that when materials and equipment were given or lent to parochial school students, the program had to contain "divertibility" safeguards to ensure that the materials and equipment would not be used for religious purposes.[154]

144. 530 U.S. 793 (2000).
145. *Id.* at 803.
146. *Id.* at 880.
147. *Id.* at 882.
148. *Id.* at 802-03.
149. *Id.* at 803-04.
150. *Mitchell*, 530 U.S. at 801.
151. *Id.* at 800.
152. *Id.* at 801, 829-30.
153. *Id.* at 814-20.
154. *Id.* at 820-25.

However, five Justices, Justices O'Connor and Breyer in a concurring opinion[155] and Justices Souter, Stevens, and Ginsburg in a dissent,[156] did require that the program contain adequate "divertibility" standards. The difference was that the O'Connor opinion found that the program did contain adequate "divertibility" standards,[157] while the Souter opinion found that it did not.[158] The result was that the Court upheld the loan of educational materials and equipment that was at issue in this case but rejected the view of the Thomas plurality that standards to prevent "divertibility" were not required by the Establishment Clause.[159]

It is important to note that the position of the Thomas plurality in *Mitchell v. Helms*—to the effect that all that the Establishment Clause requires is that aid be allocated on the basis of neutral secular criteria—to a large extent reflects the results that the Court has reached in this area in more recent years. One way or another, the Court has managed to uphold the particular aid program at issue against Establishment Clause challenge, and the result has been that the state has been constitutionally permitted to assist the educational function of parochial schools.[160]

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155. *Id.* at 836-67 (O'Connor, J., concurring).

156. *Mitchell*, 530 U.S. at 867-913 (Souter, J., dissenting).

157. *Id.* at 867 (O'Connor, J., concurring).

158. *Id.* at 902-10 (Souter, J., dissenting).

159. The Thomas plurality and the O'Connor concurrence agreed that the decision upholding the constitutionality of the program in this case required the overruling of the holdings in *Wolman v. Walter*, 433 U.S. 229 (1977), and *Meek v. Pittenger*, 421 U.S. 349 (1975), to the effect that the Establishment Clause prohibited the state from loaning parochial school students instructional and laboratory materials and from paying for the transportation of parochial school students on field trips to secular places. *Mitchell*, 530 U.S. at 835 (plurality opinion), 858-59 (concurring opinion).

160. In a law review article written after *Mitchell* but before *Zelman v. Simmons-Harris*, 539 U.S. 639 (2002), Professor Michael W. McConnell explained *Mitchell* and the school prayer at football games case of *Santa Fe Independent School District v. Doe*, 120 U.S. 2266 (2000), both decided during the same Term, as demonstrating that "[t]he emerging Establishment Clause jurisprudence can be seen as a specialized application of the state action doctrine." Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 682 (2001). He went on to say,

> Contrary to popular impression, the Establishment Clause is not "hostile," nor is it favorable, to religion; it stands for the proposition that religious activity and advocacy must be a product of the private judgments of individuals and groups. If religious activity is instigated, encouraged, or—in the strongest case—coerced by the government, the government's acts are unconstitutional. But if religious activity is the product of private judgment, it is permissible—even welcome—within the public sphere.

Id. He concluded, "Taken together, these decisions suggest, not a 'balance' between religion and secularism, but a complementary principle that religion is a matter for private judgment and conviction." *Id.* at 718. The proposition advanced by Professor McConnell is further supported by the decision in *Zelman*.

Closely related to the distinction between constitutionally impermissible "aid to the school" and constitutionally permissible "aid to the child" is the distinction between "aid to the school" and "aid to the parents of children attending a parochial school." The state assists the educational function of parochial schools by giving tax benefits to parents who send their children to parochial schools. Presumably, this form of aid reduces the costs of parochial school education and, therefore, provides a financial incentive for parents to send their children to parochial schools. In *Committee for Public Education and Religious Liberty v. Nyquist*,[161] the Court held unconstitutional the state's grant of a tax credit for school tuition paid by parents whose children were attending private or parochial schools. The Court reasoned that by lowering the costs of parochial school education for these parents, the state was subsidizing parochial school education, and held that this subsidization violated the Establishment Clause.[162] However, in the later case of *Mueller v. Allen*, [163] the Court held that there was no Establishment Clause violation when the state allowed parents across the board to take a tax deduction, as opposed to a tax credit, for educational expenses, notwithstanding that ninety-six percent of the deductions were taken for parochial school tuition.

Some academic commentators were troubled by the implications of the *Mueller* decision, especially insofar as it indicated that the Establishment Clause was not violated simply because the tax deduction made it easier for parents to exercise a private choice to send their children to parochial schools.[164] There is no doubt that the Court could

161. 413 U.S. 756 (1973).

162. *Id.* at 794.

163. 463 U.S. 388 (1983).

164. *See* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 926 (1987). Professor Simson said that the tax deduction

> has a substantial effect of supporting religion with public funds. Although a tax deduction is not an expenditure of public funds in form, it plainly is so in fact. Moreover, by relieving parents of a tangible part of the cost of educating their children in parochial school, this deduction materially increases the likelihood that parents contemplating sending their children to parochial school will decide to do so.

Id. See also Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 CALIF. L. REV. 5, 9-10 (1987), in which Professor Choper said that *Mueller* is indistinguishable from *Nyquist*. In both instances, the state was trying to provide some financial relief to parents who sent their children to private schools, including parochial schools. *Id.* at 8. He contends that it should not matter that the law in *Mueller* was facially neutral, while the law in *Nyquist* expressly favored religion, as the record showed that ninety-six percent of the tax deductions under the law were taken for parochial school payments. *Id.* at 9. He concluded that the decision in *Mueller* "opened a large window for aid to parochial schools." *Id.* at 11.

have held that the tax deduction in *Mueller*, like the tax credit in *Nyquist*, violated the Establishment Clause, because the practical effect of the deduction was to subsidize parochial school education. However, as will be discussed in the next section, the Court has consistently held that the Establishment Clause is not necessarily violated by the inclusion of the religious with the secular in the provision of a governmental benefit, such as a tax exemption.[165] The facial neutrality of the tax deduction in *Mueller* enabled the Court to distinguish *Nyquist* and to bring the case within the scope of its inclusion precedents.[166] The state may provide tax benefits for parents of all schoolchildren, notwithstanding that most of the tax benefits are claimed by parents of children attending parochial schools.

The matter of "aid to the parents of children attending parochial schools" and "individual choice" proved dispositive in the Court's 2002 decision of *Zelman v. Simmons-Harris,*[167] in which the Court first addressed the question of whether the Establishment Clause prohibited state-sponsored voucher programs that included vouchers to defray the cost of attendance at parochial schools. In that case, Ohio had set up a pilot program designed to increase the choices of lower-income parents with children in the Cleveland public schools, which, according to the Court, "have been among the worst performing public schools in the Nation."[168] The program contained both a tuition aid component and a tutorial aid component.[169] Under the tuition aid component, private schools, both non-religious and parochial, could participate in the program and accept eligible students, so long as the school was located within the boundaries of the Cleveland school district.[170] Public schools located in a district adjacent to the Cleveland school district could also participate in the program.[171] All the participating schools were required to accept Cleveland school students in accordance with rules promulgated by the state superintendent.[172] Tuition aid was distributed to parents according to financial need.[173] If the parents chose a private or parochial school, "checks [were] made payable to the parents who then endorsed the checks over to the chosen school."[174]

165. *See infra* notes 201-11 and accompanying text.
166. Mueller v. Allen, 463 U.S. 388, 402 (1983).
167. 536 U.S. 639 (2002).
168. *Id.* at 644.
169. *Id.* at 645.
170. *Id.*
171. *Id.*
172. *Id.* at 645-46.
173. *Zelman*, 536 U.S. at 646.
174. *Id.* at 645-46.

Under the tutorial aid component of the program, grants for tutorial assistance were provided to students who chose to remain in the public schools.[175] Parents arranged for registered tutors to assist their children and then submitted bills for those services to the state for payment.[176] The number of tutorial assistance grants offered to students in the district had to be equal to the number of tuition aid grants provided to students enrolled at the participating private, parochial, or adjacent public schools.[177] Virtually all of the students participating in the tuition grant program enrolled in parochial schools.[178] In addition to the tuition aid and tutorial assistance programs, the Cleveland school district set up programs for community or charter schools, which were funded by the state but were operated by their own school boards instead of by the Cleveland school district.[179] For each child enrolled in a community school, the school received state funding that was twice the funding received by a school participating in the tuition aid program.[180] The school district also operated magnet schools that emphasized a particular subject area, teaching method, or service to students.[181] For each student enrolled in a magnet school, the school district received the same amount of funding as it received for students enrolled at a traditional public school.[182]

Approximately 75,000 students were enrolled in the Cleveland school district when these programs went into operation.[183] About 3,700 students were enrolled in the tuition aid program, about 1,400 received tutorial assistance, about 1,900 were enrolled in charter schools, and about 13,000 were enrolled in magnet schools.[184]

In a 5-4 decision, the Court held that the inclusion of vouchers for parochial schools in the Cleveland tuition assistance program did not violate the Establishment Clause. The opinion of the Court by Chief Justice Rehnquist, joined in by Justices O'Connor, Scalia, Kennedy, and Thomas, invoked the "aid to the parent" and "private choice" rationale of *Mueller* and other cases.[185] According to Chief Justice Rehnquist:

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175. *Id.* at 640.
176. *Id.*
177. *Id.* at 639.
178. *Id.*
179. *Zelman*, 536 U.S. at 639.
180. *Id.* at 647.
181. *Id.*
182. *Id.* at 647-48.
183. *Id.* at 644.
184. *Id.* at 646-48.
185. *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986); *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

> [These cases] make clear that where a government aid program . . . is neutral with respect to religion, and that provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to a challenge under the Establishment Clause.[186]

This was because "[a] program that shares these features permits government aid to reach religious institutions only by way of the deliberate choice of numerous individual recipients" so that "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of the benefits."[187] The Chief Justice went on to point out that "there [were] no 'financial incentive[s]' that [would] 'ske[w]' the program toward religious schools," since the aid was "'allocated on the basis of neutral, secular criteria that neither favor or disfavor religion,'" and that in fact the program created "financial disincentives" for religious schools, with private and parochial schools receiving only half of the assistance given to charter schools and only one-third of the assistance given to magnet schools.[188] He also rejected the contention that the state was creating a public perception that it was "endorsing religious practices and beliefs," since the program was a neutral one of private choice "where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals," and there was no evidence "that the program fail[ed] to provide genuine options for Cleveland parents to select secular educational opportunities for their school-age children."[189]

Justices O'Connor and Thomas, in a concurring opinion, insisted that the decision was not a "dramatic break from the past" and emphasized that a "true private choice" inquiry "should consider all reasonable educational alternatives to religious schools that are available to parents."[190] Justices Souter, Stevens, Ginsburg, and Breyer dissented, insisting that public funds would be supporting the teaching of religion and that this result was not obviated by the fact that the governmental support for the teaching of religion comes about through "private choice."[191]

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186. *Zelman*, 536 U.S. at 652.
187. *Id.*
188. *Id.* at 653 (quoting *Witters*, 474 U.S. at 487-88).
189. *Id.* at 654-55.
190. *Id.* at 663 (O'Connor, J., concurring).
191. *Id.* at 699-700 (Souter, J., dissenting).

The *Zelman* decision provides a roadmap for states and school districts wishing to adopt voucher programs that include vouchers for attendance at parochial schools.[192] The voucher program must be filtered through the parents of children attending parochial schools and must include a number of other alternatives to the use of vouchers for attendance at parochial schools. However, the use of voucher programs since *Zelman* has been relatively limited, and while a number of voucher programs of one sort or another have been adopted, voucher programs, particularly those that include vouchers for attendance at parochial schools, have not become a major part of the American educational system.[193]

There are three reasons why this has been so. In the first place, the Court in *Zelman* made it clear that vouchers for attendance at private and parochial schools must be only one component of a larger program involving a number of other alternatives for parents of children enrolled in the public schools.[194] This being so, a state or school district cannot do vouchers "on the cheap," so to speak, but must devote considerable resources to providing other alternatives. Second and more importantly, thirty-nine states have state constitutional "no aid" provisions that preclude the use of state funds for the support of "sectarian or denominational schools,"[195] and these and related provisions have been interpreted by some state courts as prohibiting voucher programs that include vouchers for attendance at parochial schools.[196] While some other state courts have upheld these programs against state constitutional

192. *See Zelman*, 536 U.S. 639.

193. For discussions of voucher programs since 2002, see JIM CARL, FREEDOM OF CHOICE: VOUCHERS IN AMERICAN EDUCATION 199 (2011) ("The growth of school vouchers has been anemic since 2002 . . . ."); Lenford C. Sutton & Richard A. King, *School Vouchers in a Climate of Political Change*, 36 J. EDUC. FIN. 244 (2011); ALEXANDER USHER & NANCY KOBER, CTR. ON EDUC. POLICY, KEEPING INFORMED ABOUT SCHOOL VOUCHERS: A REVIEW OF MAJOR DEVELOPMENTS AND RESEARCH (2011), *available at* http://cep-dc.org/displayDocument.cfm?DocumentID=369.

194. *Zelman*, 536 U.S. 639.

195. *See* Sutton & King, *supra* note 195, at 248-51 (providing a summary of "no aid" clauses in state constitutions); *see, e.g.*, CAL. CONST. art. IX, § 8 ("No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of officers of the public schools."). Sixteen states, including two that do not have "no aid" clauses, have "uniformity" clauses, providing that it is the duty of the state to "maintain a uniform public school system." *See* Sutton & King, *supra* note 193, at 247, 261.

196. *See* Cain v. Horne, 202 P.2d 1178 (Ariz. 2009); *see also* Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539 (Vt. 1999); *see also* Owens v. Colo. Cong. of Parents, Teachers & Students, 92 P.3d 933 (Colo. 2004) ("uniformity" provision); *see also* Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) ("local control" provision).

challenge using the rationale of *Zelman*,[197] the fact that in many states these programs are subject to state constitutional challenge is likely to inhibit states and school boards in those states from undertaking them. Third, and probably most importantly, has been the rise in charter schools, which are publicly-funded, non-sectarian schools operated under contract between the state or public school systems and private companies. Charter schools have given parents of children attending public schools an alternative to avoid the public schools, often with a greater degree of parental control. The availability of charter schools has clearly reduced public pressure for voucher programs.[198] Therefore, while the Supreme Court has upheld the constitutionality of voucher programs that include vouchers for attendance at parochial schools, such programs are not widespread in the United States today.[199]

In the area of aid to religious schools, the Court has drawn a sharp distinction between constitutionally impermissible "aid to the school" and constitutionally permissible "aid to the child," including aid to the parents of children attending parochial schools. However, the Court's more recent decisions in *Mitchell v. Helms* and *Zelman v. Simmons-Harris* have expanded the definition of "aid to the child/parent," continuing a trend followed in earlier cases such as *Agostini* and *Muller,* with the result today that the inclusion of children attending parochial schools and their parents in benefit and aid programs provided to children attending public schools and their parents does not violate the Establishment Clause. What this means in practice is that as a constitutional matter, the government can provide significant financial assistance to the educational function of parochial schools.[200]

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197. *See* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998); *see also* Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999).

198. According to Mr. Carl, as of 2010, charter schools operated in forty states and the District of Columbia, enrolling nearly two million students. He suggested that "[i]n the first decade of the new century, state legislatures and voters were more attracted to charter schools than they were to voucher programs, perhaps because charter schools avoided church state entanglements." CARL, *supra* note 193, at 199. Today, however, in some states there are new efforts to establish voucher and tax credit programs. *See* Fernanda Santos & Motoko Rich, *States Shifting Aid for Schools to the Families*, N.Y. TIMES, Mar. 28, 2013, at 1A.

199. *Id.*

200. In an interesting article, Professor Richard C. Schragger said that the effect of the *Zelman v. Harris* aid to the parent rationale is to insulate the public subsidization of private religious activity from Establishment Clause concern and to eliminate inquiry into matters such as "divertibility" or the "pervasively sectarian" character of the institution to which the aid flows. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1857-58 (2004). The only constitutional requirement, he said, is one of neutrality and even-handedness. *Id.*

3. Equal Treatment of Religion

The Supreme Court has held that because the Establishment Clause does not require governmental hostility to religion, the government's inclusion of the religious with the secular in the receipt of a governmental benefit does not necessarily violate the Establishment Clause.[201] The leading case on this subject is *Walz v. Tax Commission*,[202] in which the Court held that a property tax exemption for non-profit institutions, including churches, did not violate the Establishment Clause. The inclusion of church property in the exemption was said to promote "benevolent neutrality" toward religion [203] and avoided the "entanglement" problems that could result from governmental valuation of church property for tax purposes and enforcement of the tax against church property.[204]

Nonetheless, the property tax exemption for church property conferred a very valuable financial benefit on churches and, like any other tax exemption, effectively subsidized the churches' activity. The effect of *Walz* is to allow the state to provide a financial benefit to religion through a tax exemption when it could not provide such a benefit through a direct grant.[205] Crucial to the Court's holding in *Walz* is the matter of inclusion. The tax exemption was for non-profit institutions.[206] Therefore, churches qualified for the grant not because they were churches, but because they were included within the class of non-profit institutions.[207] As one commentator put it, "those institutions shared a relevant nonreligious attribute with secular institutions."[208] There is no doubt that a property tax exemption for churches alone would violate the Establishment Clause as a preference for religion, notwithstanding that such an exemption would avoid the "entanglement" problems that the Court identified in *Walz*. This point is demonstrated by *Texas Monthly,*

201. Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970).

202. *Id.*

203. *Id.* at 669, 671-73.

204. *Id.* at 674-76.

205. *See* William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 500-01 (1986). Professor Marshall noted that the tax exemption in *Walz* provided a more significant benefit to religion than any other, so the result is inconsistent with the Establishment Clause objective of prohibiting financial aid to religion. *Id.* Professor Choper also attacked the result in *Walz* as endangering religious liberty because the effect of the exemption is to allow tax funds to be expended for religious purposes. *See* CHOPER, *supra* note 5, at 37.

206. *Walz*, 397 U.S. 664.

207. *Id.* at 679-80.

208. Abner S. Greene, *The Political Balance of the Religion Clauses,* 102 YALE L.J. 1611, 1627 (1993).

Inc. v. Bullock,[209] in which the Court held unconstitutional an exemption from the state sales tax law for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."[210] In other words, inclusion of the religious with the secular marks the distinction between the constitutionally permissible equal treatment of religion and the constitutionally impermissible preference for religion.[211]

Because the inclusion of the religious with the secular in the receipt of a governmental benefit does not necessarily violate the Establishment Clause, an Establishment Clause violation would only occur when the inclusion in the particular benefit is inconsistent with a specific Establishment Clause principle or doctrine.[212] In the previous section, we have discussed governmental financial assistance to the educational function of parochial schools. We have seen that the Court has drawn a sharp distinction between "aid to the school" and "aid to the child/parent." Governmental financial assistance that takes the form of "aid to the school," such as paying the salaries of parochial school teachers of secular subjects, violates the Establishment Clause, notwithstanding that the government also pays the salaries of teachers of secular subjects in the public schools.[213] The government would also violate the Establishment Clause by sending public school teachers of basic subjects into the parochial schools, since this form of financial assistance would "relieve sectarian schools of costs they otherwise would have borne in educating their students" and would "have the effect of advancing religion by creating a financial incentive to undertake sectarian education."[214] The same would be true of a program providing grants to both parochial and public schools for the repair of school buildings.[215] Similarly, in *Mitchell v. Helms*,[216] a Court majority held that

209. 489 U.S. 1 (1989).

210. *Id.* at 5.

211. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 184 (1992). As Professor McConnell has observed,

> When the government provides no financial support to the nonprofit sector *except for churches*, it aids religion. But when the government provides financial support to the entire nonprofit sector, religious and nonreligious institutions alike, on the basis of objective criteria, it does *not* aid religion. It aids higher education, health care, or child care; it is neutral to religion.

Id.

212. *Id.*

213. *See supra* notes 135-136 and accompanying text.

214. *See* Agostini v. Felton, 521 U.S. 203, 229-30; *see also supra* notes 137-143 and accompanying text.

215. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

216. 530 U.S. 793 (2000).

the Establishment Clause required that the loan of materials and equipment to parochial school students be accompanied with adequate standards to prevent divertibility of the materials and equipment for religious purposes. If that requirement had not been satisfied, the program would have been unconstitutional as "aid to the school" in violation of the Establishment Clause notwithstanding that the same benefit was provided to public school students.[217]

But when the inclusion of the religious with the secular in the particular benefit is not inconsistent with a specific Establishment Clause principle or doctrine, such as when the particular benefit takes the form of "aid to the child," it is the inclusion of the religious with the secular that makes the giving of the benefit constitutionally permissible. For the same reason, when the state establishes a program to enable students with disabilities to receive an education so that they can acquire a marketable skill, the state does not violate the Establishment Clause by paying the tuition of a blind student to attend a sectarian college in order to receive an education that would enable him to pursue a religious vocation.[218] The purpose of the program was to enable students with disabilities to receive an education so that they could acquire a marketable skill, and the most logical place for him to do so would be at a sectarian college.[219]

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217. *Id.*

218. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

219. Here, as in *Zelman*, this was a government program that was "neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).

However, while the state is permitted by the Establishment Clause to include religious study in a program of financial assistance to college students, it is not required by the Free Exercise Clause to do so. For this reason, a state does not violate the Free Exercise Clause when it denies financial assistance to a student pursuing a degree in "devotional theology." Locke v. Davey, 540 U.S. 712 (2004). The state's refusal to provide financial assistance to a student pursuing a degree in "devotional theology" was based on a "no aid" provision in the state constitution, WASH. CONST., art. 1, § 11, which states, "'No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.'" *Id.* at 719 n.2. The Court held that the ban on funding for study in devotional theology advanced a valid state "anti-establishment" interest and that the state provided scholarships for study at pervasively sectarian institutions so long as the student was not pursuing a degree in devotional theology. *Locke*, 540 U.S. at 724-25. Compare Colo. Christian Univ. v. Weaver, 534 F.3d 1245 (10th Cir. 2008), in which the Court found unconstitutional a state scholarship program that provided funding for students attending sectarian institutions but denied funding for students attending institutions that were "pervasively sectarian" on the ground that it distinguishes between religions. See also the discussion of *Locke* in Richard C. Schragger, *supra* note 200, at 1859-66, in which the author pointed out that the holding in *Locke* means that the principle of government neutrality does not require that the state treat religion and nonreligion equally. Rather, the

To take another example of the permissible inclusion of the religious with the secular, in a series of cases, the Court has held that providing religious groups with equal access to public facilities for purposes of expression does not violate the Establishment Clause. Such access, standing alone, does not have the effect of advancing religion; it does not create a symbolic union between government and religion, nor does it constitute governmental endorsement of the religious group's message. At this point, the freedom of expression component of the First Amendment comes into play. Under the First Amendment public forum doctrine, whenever the government designates public property or facilities as a public forum, it must provide all groups equal access to the property for the purpose of expression. Since providing equal access to religious groups for purposes of expression does not violate the Establishment Clause, the government is constitutionally required to provide such access under the First Amendment public forum doctrine.[220]

We see, then, that the Court has gone quite far in holding that the inclusion of the religious with the secular in the receipt of a governmental benefit does not violate the Establishment Clause. It has upheld the inclusion of religious institutions in tax exemptions for non-profit institutions. It has upheld the inclusion of parochial school students with public school students in benefits provided to school children that come within the ambit of "aid to the child" and scholarship programs that include students wishing to engage in religious study. It has held that providing religious groups with equal access to public facilities does not violate the Establishment Clause, so that such access is required by the First Amendment principle of content neutrality. An Establishment Clause violation will occur only when the inclusion in the particular

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question in such a situation is whether the resulting differential treatment of religion "burdened a fundamental right of religious exercise." *Id.* at 1862. The author also maintained that "Establishment Clause values point toward the validity of Washington's" exclusion of the study of "devotional theology" from the scholarship program. *Id.* at 1864.

220. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (involving a statehouse plaza dedicated as a public forum); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (involving the after-school use of school facilities by private groups); *see also* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990) (involving facilities of public schools available for use by student groups); *see also* Widmar v. Vincent, 454 U.S. 263 (1981) (involving facilities of state university available for use by student groups); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (considering a university's policy of paying printing costs of student publications as applied to require payment of printing costs for publication of student religious organization); *see also* John H. Garvey, *All Things Being Equal,* BYU L. REV. 587, 588-92 (1996) (discussing the interaction between the Establishment Clause, the First Amendment public forum doctrine, and the content neutrality principle in this situation).

benefit is inconsistent with a particular Establishment Clause principle or doctrine. The result has been that the Establishment Clause, which requires only neutrality and not hostility toward religion, has not been interpreted as prohibiting the government from providing significant financial benefits to religious persons and religious institutions.[221]

C. Governmental Action Purportedly Advancing Religion

The Supreme Court cases in this category primarily involve constitutional challenges to governmental displays that consist of or include religious symbols, such as nativity scenes or the Ten Commandments. These displays will be found to be unconstitutional under the Establishment Clause if they were adopted for the purpose of advancing religion (in violation of the first *Lemon* principle) or would appear to an objective observer to have the effect of advancing religion (in violation of the second *Lemon* principle).[222]

In the earlier article, I discussed the two Supreme Court cases dealing with the constitutionality of Christmas holiday season displays involving a nativity scene and a Chanukah menorah.[223] In the first case to reach the Court, *Lynch v. Donnelly,*[224] the Court held in a 5-4 decision that the inclusion of a nativity scene in a governmentally-sponsored Christmas holiday season display, which contained a Santa Claus, Christmas trees, toy animals, and the other secular symbols of Christmas, did not violate the Establishment Clause. The plurality opinion of Chief Justice Burger saw the primary effect of the display to be the celebration of the Christmas season by the display of its traditional symbols, such as a nativity scene, and the first part of the Burger opinion seemed to be saying that as long as the symbol used was a traditional one, even if

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221. *See* Volokh, *supra* note 90, at 365-73 (discussing the constitutional mandate of equal treatment).

222. Two points should be noted here. First, as discussed in connection with the subsidiary doctrine of secular deism, *see supra* notes 68-71 and accompanying text, religion has long been a very important part of American life, and practices that were historically religious have lost their religious significance through long usage in a secular context. Second, as discussed in connection with the subsidiary doctrine of primary effect and incidental benefit, *see supra* notes 63-64 and accompanying text, when the primary effect of a governmental action is to advance a secular purpose, that action does not violate the Establishment Clause merely because it provides an "incidental benefit" to religion. In light of these subsidiary doctrines, the fact that a governmental display consists of or includes a historically religious symbol does not necessarily render the display unconstitutional. The constitutional question depends on whether the display was adopted for a religious purpose or has the effect of advancing religion.

223. *See* Sedler, *supra* note 1, at 1400-03.

224. 465 U.S. 668 (1984).

purely religious in nature, the display did not have the primary effect of advancing religion, so that any benefit to religion was "incidental."[225]

The crucial fifth vote to uphold the constitutionality of the display was cast by Justice O'Connor, and in her concurring opinion, Justice O'Connor set forth what subsequently became the "endorsement" part of the endorsement/symbolic union doctrine.[226] The question for her was whether the display would be perceived by an objective observer as sending a message of endorsement of Christianity.[227] She concluded that the display would not be perceived as sending a message of endorsement, because the inclusion of the nativity scene along with all the secular symbols of Christmas did no more than acknowledge the historically religious origin of what had now become a secular holiday.[228] The second part of the Burger opinion likewise emphasized the fact that the nativity scene was included as a part of a larger holiday season display and that in that context it was an acknowledgment of the historical origin of the holiday.[229]

A reader of the Burger and O'Connor opinions would probably conclude that Burger would vote to uphold the constitutionality of a nativity scene display standing alone, while O'Connor would probably find the unadorned display unconstitutional. When that question came before the Court in the 1989 case of *County of Allegheny v. ACLU*,[230] O'Connor joined the four *Lynch* dissenters. The Court held, in another 5-4 decision, that the display of an unadorned nativity scene would send a message of endorsement of Christianity, thus violating the endorsement/symbolic union doctrine and the advancing or inhibiting religion *Lemon* principle.[231] However, in line with the holding in *Lynch*, the Court in *County of Allegheny* also held that the inclusion of a Chanukah menorah as part of a "salute to liberty" display, next to a large Christmas tree and a "Salute to Liberty" sign, did not send a message of endorsement of religion and so was constitutionality permissible.[232]

The applicable doctrine emerging from these cases would seem to make the determination of the constitutionality of governmental displays of religious symbols very fact-specific.[233] The display of a particular religious symbol in the circumstances presented cannot convey to an

225. *Id.* at 673-78.
226. *Id.*
227. *Id.* at 687-94 (O'Connor, J., concurring).
228. *Id.* at 692-95.
229. *Id.* at 680-87.
230. 492 U.S. 573 (1989).
231. *Id.* at 616-21.
232. *Id.* at 616-18, 632-37.
233. *Id.* at 573.

objective observer a message of endorsement of religion.[234] If the display conveys such a message of endorsement, then it has the effect of advancing religion and is unconstitutional.[235] If the display does not convey this message of endorsement, then it does not have the effect of advancing religion and is constitutionally permissible, despite any "incidental benefit" to religion.[236]

However, the result of the Court's application of this doctrine to the displays involved in *Lynch* and *County of Allegheny* is to permit governmental bodies to display the religious symbols of a nativity scene and a Chanukah menorah at Christmas time, so long as the display includes some secular symbols such as a Christmas tree or the proverbial "Santa Claus and three reindeer."[237] In those cases, the purpose of the display was found to be the secular one of celebrating the holiday season by its traditional symbols, even though some of the symbols were religious, thus satisfying the first *Lemon* principle. In addition, because some secular symbols have been included in the display, the display was found not to constitute an endorsement of religion, thus satisfying the second *Lemon* principle. In effect, the view of the Burger plurality in *Lynch* that the government may celebrate Christmas with a nativity scene or other religious symbol has prevailed, subject only to the requirement that the display include a Christmas tree or the proverbial "Santa Claus and three reindeer."[238] Thus, the issue is now settled with respect to Christmas holiday season displays.

In 2005, the Court decided two cases dealing with Ten Commandments displays that will now provide guidance as to the constitutional permissibility of other displays containing religious symbols.[239] The Court had long before held that the display of the Ten Commandments in a public school classroom was the display of a sacred text of the Jewish and Christian religions and so violated the Establishment Clause.[240] In *McCreary County v. ACLU*,[241] the Court

234. *Id.*

235. *Id.*

236. *Cnty. of Allegheny*, 492 U.S. 573.

237. *See id.*; *see also* Lynch v. Donnelly, 465 U.S. 668 (1984).

238. I was unsuccessful in my efforts to persuade the Sixth Circuit to invalidate a Christmas display that I claimed was "dominated" by a nativity scene, arguing that the addition of some of the secular symbols of Christmas did not alter the message of endorsement of Christianity conveyed by the "dominant" nativity scene. The court rejected the contention, stating that "dominance" was not the test and that looking to the location of the display and the context of the celebration of Christmas as a national holiday, the display as a whole did not send an impermissible message of endorsement. *See* Doe v. City of Clawson, 915 F.2d 244 (6th Cir. 1990).

239. McCreary Cnty., Ky. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

240. Stone v. Graham, 449 U.S. 39 (1980).

dealt with the situation in which two Kentucky counties had posted a copy of the Ten Commandments in county buildings. In the first county, the county legislative body adopted a resolution that the display "be posted in a very high traffic area of the courthouse."[242] In the second county, the Ten Commandments "were hung in a ceremony presided over by the county [j]udge-[e]xecutive" accompanied by a pastor.[243] After a civil liberties organization brought a federal suit against the counties that sought to enjoin the displays on the ground that they violated the Establishment Clause, "the legislative body of each [c]ounty authorized a second, expanded display" of the Ten Commandments.[244] The counties recited "that the Ten Commandments are the precedent legal code upon which the civil and criminal codes of . . . Kentucky are founded," along with eight other historical documents that either had a religious theme or were excerpted to highlight a religious element.[245] The District Court found that both displays violated the Establishment Clause under the first *Lemon* principle in that they were both enacted solely for a religious purpose.[246]

The counties then posted a new display consisting of a framed copy of the Ten Commandments and nine other documents, including "the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice."[247] The copy of the Ten Commandments contained a comment explaining how "[t]he Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country."[248] The District Court found that the purpose of the third display was a religious one to post the Ten Commandments and so was unconstitutional.[249] A divided Sixth Circuit affirmed.[250]

The Supreme Court held in a 5-4 decision that the "Foundations of American Law and Government Display" violated the Establishment Clause.[251] The majority opinion by Justice Souter, joined in by Justices Stevens, O'Connor, Ginsburg, and Breyer, held that the religious purpose principle of *Lemon* was required by the overriding Establishment Clause

241. 545 U.S. 844 (2005).
242. *Id.* at 851.
243. *Id.*
244. *Id.* at 852-53.
245. *Id.* at 853.
246. *Id.* at 851-54.
247. *McCreary Cnty.*, 545 U.S. at 856.
248. *Id.* at 855-56.
249. *Id.*
250. *Id.* at 857-58.
251. *Id.* at 881.

principle of complete official neutrality toward religion and found that there was "ample support for the District Court's finding of a predominantly religious purpose behind the counties' third display."[252] Justice Scalia, joined by Chief Justice Rehnquist, Justice Thomas, and in large part Justice Kennedy, dissented primarily on the ground that if the effect of the display would not be to advance religion, the display should not be held unconstitutional because of a finding of a religious purpose behind the display.[253] Implicit in the Court's holding was that if the counties had simply provided for a "Foundations of American Law and Government Display" without the past history of the two Ten Commandments displays and obvious efforts to promote the Ten Commandments, there would have been no Establishment Clause violation. The Court stated, "Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a government display on the subject of law, or American history," noting that the frieze in the Supreme Court courtroom includes the figure of Moses holding the text of the later secularly-phrased Commandments in the company of seventeen other lawgivers (most of which were secular figures) and that "there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion."[254] The significance of *McCreary*, then, is that it enables opponents of a government display containing religious symbols to assert a successful challenge to the display on the ground that it was undertaken for a religious purpose in violation of the first *Lemon* principle.[255]

In the companion case of *Van Orden v. Perry*,[256] the Court held, 5-4, with Justice Breyer changing sides, that the inclusion of a Ten Commandments monument—presented to the State of Texas by a private civic organization in 1961 and located in a display on a twenty-two acre area of the Texas State Capitol's grounds that contained "[seventeen] monuments and [twenty-one] historical markers, commemorating the people, ideals and events that compose Texan identity"—did not violate the Establishment Clause. The plurality opinion of Chief Justice Rehnquist, joined in by Justices Scalia, Kennedy, and Thomas, maintained that the Establishment Clause did not preclude the government from recognizing and acknowledging the religious heritage of the American people and that the inclusion of the Ten Commandments among the monuments and historical markers in the large display on the capitol grounds "has a dual significance partaking of both religion and

252. *Id.* at 873-81.
253. *McCreary Cnty.*, 545 U.S. at 885, 900-03 (Scalia, J., dissenting).
254. *Id.* at 874.
255. *Id.* at 881.
256. 545 U.S. 677 (2005).

government."[257] Justice Breyer said that this was a "borderline case," but in light of the context of the display, the secular aspects of the display predominated over the religious ones, so that the display was not inconsistent with the basic purposes of the Religion Clauses."[258] Justices Stevens, O'Connor, Souter, and Ginsburg dissented, essentially contending that the display of the Ten Commandments monument violated the Establishment Clause because it contained only a religious message and thus had the purpose and effect of advancing religion.[259]

In effect, *Van Orden* does for the Ten Commandments and other religious monuments what *Lynch* and *Allegheny County* did for nativity scenes and Chanukah menorahs.[260] The Ten Commandments and other religious monuments may be included in a display along with secular monuments so long as there is a secular purpose for the display.[261] This would mean that the "Foundations of American Law and Government Display" involved in *McCreary* would have been upheld as constitutional if the Court had not found that, in light of the two previous efforts to display the Ten Commandments alone, the display was undertaken for a religious purpose in violation of the first *Lemon* principle. As a practical matter, when government officials want to sponsor a Ten Commandments display, it is usually because they want to proclaim their "religiosity" to the public, and this would mean that they have a religious purpose for the display in violation of the first *Lemon* principle. The likely effect of *McCreary* and *Van Orden*, then, is that older displays containing the Ten Commandments along with secular monuments or documents are likely to be upheld against Establishment Clause challenge because usually it can be shown that the display was designed to advance a secular purpose.[262] However, public officials are not likely to want to promote a new display containing the Ten Commandments because they cannot publicly proclaim their "religiosity" when they do so. For this reason, we are not likely to see many new displays containing the Ten Commandments along with secular documents.

257. *Id.* at 684-92 (plurality opinion).

258. *Id.* at 700-04 (Breyer, J., concurring).

259. *Id.* at 707-47 (dissenting opinions of Stevens, J., O'Connor, J., and Souter, J.).

260. *See generally id.*

261. *Id.* at 682-83.

262. See, for example, Card v. City of Everett, 520 F.3d 1009, 1010 (9th Cir. 2008), in which the Ninth Circuit held that the city's display of a Ten Commandments monument donated to it by a private organization in 1959 did not violate the Establishment Clause. *Id.* at 1019-20. This was because the city could assert a secular purpose for the display of the monument, and there were secular monuments, such as three war memorial monoliths, in the vicinity of the Ten Commandments monument. The court relied primarily on Justice Breyer's analysis in *Van Orden*. *See id.* at 1017-21.

Another consequence of *Van Orden* is to reaffirm that part of *Allegheny County* that holds that a display of a religious symbol standing alone violates the Establishment Clause because it sends a message of endorsement of religion.[263] This means that even if the display was not undertaken for a religious purpose and so did not violate the first *Lemon* principle, the fact that it sends a message of endorsement of religion violates the second *Lemon* principle and so renders it violative of the Establishment Clause.[264] Looking to post-*Van Orden* lower court cases, the Tenth Circuit has held unconstitutional a memorial display erected by the Utah Highway Patrol Association on public land to honor the memory of fallen troopers, which consisted of twelve-foot high crosses with six-foot horizontal cross-bars, each containing the fallen trooper's name and other information. The court found that the display did not violate the first *Lemon* principle, but because it consisted of the Latin cross ("unequivocally a symbol of the Christian faith"), it conveyed a message of endorsement of Christianity, violated the second *Lemon* principle, and was unconstitutional.[265] Similarly, the Ninth Circuit held unconstitutional the display of a forty-three-foot Latin cross atop Mount Soledad in the La Jolla community of San Diego, California.[266] At the time of the litigation, the land on which the cross was erected had been sold to the United States government, and pursuant to an Act of Congress, the monument had been designated as a national memorial honoring veterans of the United States Armed Forces.[267] The Ninth Circuit found that despite the addition of some secular symbols to the memorial, the cross stood out—it was visible from miles away and towered over the thousands of drivers who traveled daily on the interstate highway below—and so sent a message of endorsement of Christianity in violation of the Establishment Clause.[268]

While challenges to governmental displays containing religious symbols may be expected to continue, the Supreme Court has set forth applicable constitutional doctrine with reference to the first two *Lemon* principles. The use of religious symbols in the display will violate the Establishment Clause if it can be shown that the purpose for doing so

263. *Van Orden*, 545 U.S. at 677.

264. *Id.*

265. Am. Atheists, Inc. v. Duncan, 637 F.3d 1095, 1120 (10th Cir. 2010) (quoting Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10th Cir. 2008)), *cert. denied*, 132 S. Ct. 12 (2011).

266. Trunk v. City of San Diego, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012) (holding that the cross was a sectarian war memorial honoring only members of a particular religion).

267. *Id.* at 1102-06.

268. *Id.*

was a religious one.[269] If a religious purpose cannot be shown, the use of religious symbols in the display will violate the Establishment Clause only if the display of the religious symbol in the circumstances presented would convey to an objective observer a message of endorsement of religion. This will usually be the case where the religious symbol, such as a nativity scene or a Ten Commandments monument, stands alone without any secular symbols.[270] When the display includes secular symbols, it is likely that it will be found not to convey a message of endorsement and so will not violate the Establishment Clause.[271]

In the earlier article, going beyond governmental displays containing religious symbols, I discussed a number of lower court cases dealing with the matter of "advancing religion" in various contexts. These included matters such as court-mandated attendance of persons convicted of alcohol or substance abuse violations at support programs sponsored by religious organizations, inclusion of representatives of religious organizations in governmental advisory bodies and the like, and delegation of law enforcement authority to a religious organization.[272] I said at the time that "[i]t is in this area especially that the lower courts must apply settled Supreme Court doctrine and precedent to resolve a myriad of questions, and, for the time being at least, they are likely to

269. For a criticism of what the author calls the Court's "actor-focused approach to the constitutional permissibility of religious displays," see Judge Edith Brown Clement, *Public Displays of Affection . . . For God: Religious Monuments After McCreary and Van Orden*, 32 HARV. J.L. & PUB. POL'Y 231 (2009).

270. For a criticism of the endorsement test, in particular as it relates to what the author calls "The Regulation of Local Expression," see Schragger, *supra* note 200, at 1875-80.

271. In this connection, mention should be made of Salazar v. Buono, 559 U.S. 700 (2010). In 1934, a veteran's organization mounted a large Latin Cross on Sunrise Rock in the Mojave National Preserve as a memorial to soldiers who died in World War I. *Id.* at 705-10. While a lawsuit challenging the display of the Latin Cross as violative of the Establishment Clause was pending, Congress passed a law designating the cross and adjoining land as a national memorial and later passed a land transfer law directing the Secretary of the Interior to transfer to the veterans organization the government's interest in the land that had been designated a national memorial in exchange for land elsewhere in the Preserve. *Id.* A federal appeals court found that the transfer was invalid as an attempt to keep the cross atop Sunrise Rock. *Id.* A badly-splintered Supreme Court reversed the injunction issued by the federal court and remanded the case for further proceedings. *Id.* at 722. Three Justices indicated their view that the transfer probably did not violate the Establishment Clause, *id.* at 719-20 (Kennedy, J., joined by Roberts, C.J. and Alito, J.); two Justices found that the plaintiff lacked standing, *id.* at 727-36 (Scalia, J., joined by Thomas, J.); and four Justices dissented, three of whom indicated their view that there was an Establishment Clause violation, *id.* at 736-60 (Stevens, J., joined by Ginsburg, J. and Sotomayor, J.). Justice Breyer dissented on the ground that the issuance of the injunction should have been affirmed. *Salazar*, 559 U.S. at 760-64 (Breyer, J., dissenting). There are no further reported decisions in this case at the present time.

272. *See* Sedler, *supra* note 1, at 1405-08.

have the final say on the resolution of these questions."[273] Nothing has changed in the intervening years. No cases dealing with other matters of "advancing religion" have come before the Supreme Court, and the lower federal courts will continue to resolve those cases in accordance with settled Supreme Court doctrine and precedent as they arise.

We may conclude the consideration of "advancing religion" with a discussion of *Marsh v. Chambers*[274] and what may be called the "legislative prayer" exception to the law of the Establishment Clause. In *Marsh*, the Court held that the opening of sessions of Congress and other legislative bodies with prayer does not violate the Establishment Clause, because Congress followed this practice at the time the First Amendment was adopted.[275] The Court explicitly refused to apply the *Lemon* principles to the practice of legislative prayer.[276] If it had, it would have been compelled to declare legislative prayer unconstitutional because legislative prayer clearly has the effect of advancing religion in the same manner as prayer in school or prayer at a high school commencement. For whatever reason, in *Marsh*, a majority of the Court was persuaded that it should look to historical context, and so the Court upheld legislative prayer.[277] Precisely because *Marsh* was based on historical acceptance of the challenged practice rather than on the "law of the Establishment Clause," and because it is difficult to find any other example of historical acceptance of a religious practice, *Marsh* is not a precedent that is capable of extension. Thus, when the Fourth Circuit was called upon to determine the constitutionality of judicial prayer in the courtroom, it had no difficulty in limiting *Marsh* to its precise facts and in invalidating judicial courtroom prayer on the ground that it had the effect of advancing religion.[278] Similarly, two other circuits, in cases some years apart, have held that school board meetings, where students are often in attendance in order to receive awards and for other purposes, are more like school classrooms than legislative chambers, so that the legislative prayer exception does not apply and that the saying of prayers is unconstitutional.[279] In addition, in a number of cases, courts, seeing *Marsh* and *County* of *Allegheny* as teaching "that a legislative body cannot . . . 'exploit' the prayer opportunity to 'affiliate' the Government

273. *Id.* at 1408.

274. 463 U.S. 783 (1983).

275. *Id.* at 787-88.

276. *Id.* at 791.

277. *Id.* at 787-88.

278. *See* N.C. Civil Liberties Union Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991).

279. *See* Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999); Doe v. Indian River Sch. Dist., 653 F.3d 256 (3d Cir. 2011).

with one specific faith or belief in preference to others,"[280] have held that governmental bodies violated the Establishment Clause by using only Christian ministers and Christian prayers.[281] *Marsh* stands as an anomaly in the Court's Establishment Clause jurisprudence, and except for the result in the case itself, it is not a meaningful part of that jurisprudence and of the "law of the Establishment Clause."

D. Entanglement: Governmental Interference in Religious Matters

The cases discussed in this part of the Article involve the third *Lemon* principle of excessive entanglement. This principle means, first, that the civil courts may not become involved with matters of religious doctrine or policy and must defer to the resolution of these issues by the highest tribunal of a hierarchical church authority. Thus, the courts cannot interfere with the decisions of the appropriate ecclesiastical authority within the church as to what persons are entitled to serve as ecclesiastical officials.[282] Nor may they become involved in disputes between church factions over control of church property, with each group claiming to have the "true faith."[283] Again, the courts must defer to the determination of this matter by the highest tribunal of a hierarchical church organization.[284] However, when the form of church organization is congregational rather than hierarchical, the courts may, consistent with the Establishment Clause, apply general principles of contract and property law to determine which of the contending factions is entitled to the church property.[285]

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280. Wynne v. Town of Great Falls, 376 F.3d 292, 298 (4th Cir. 2004).

281. *See id.; see also* Galloway v. Town of Greece, 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (2013); *see also* Joyner v. Forsyth Cnty., 653 F.3d 341 (4th Cir. 2011).

The process by which the legislative body selects members of the clergy to deliver the prayers must be "religiously neutral" and cannot exclude particular religions from the selection process. *See, e.g.*, Pelphrey v. Cobb Cnty., 547 F.3d 1263 (11th Cir. 2008). For recent cases upholding the constitutionality of the legislative body's selection process, see Rubin v. City of Lancaster, 710 F.3d 1087 (9th Cir. 2013), and Atheists of Fla. v. City of Lakeland, 713 F.3d 577 (11th Cir. 2013).

282. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); *see also* Gonzalez v. Roman Catholic Archdiocese, 280 U.S. 1 (1929).

283. *See Milivojevich*, 426 U.S. 696; *see also Gonzalez*, 280 U.S. 1.

284. *See* Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 679 (1871). These cases and the cases cited in the preceding footnote were recently discussed by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704-05 (2012), during the course of which the Court observed that "[o]ur decisions in that area confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers."

285. *See* Jones v. Wolf, 443 U.S. 595 (1979).

Second, the excessive entanglement principle may prevent application of general laws to the activities of religious organizations. In this context, the excessive entanglement principle of the Establishment Clause may overlap with the Free Exercise Clause, but there is an important difference. The application of general laws to the activities of religious organizations would only raise a Free Exercise concern if that application significantly interfered with the ability of the religious organization to carry out its religious function. In the earlier article, I said that under current Free Exercise doctrine, that showing seemingly would be very difficult to make, since the Court has, for the most part, rejected the claim of a "Free-Exercise required exemption" from generally applicable laws.[286] However, in the recently decided case of *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission,*[287] that showing was made with respect to the application of the ministerial exception to anti-discrimination laws so as to bar a discrimination suit brought by a teacher at a parochial school who had the status of a "minister" under church law. As Chief Justice Roberts observed in his opinion for the Court, "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[288] He also pointed out that while in some cases there may be an "internal tension" between the Establishment Clause and the Free Exercise Clause, that was not so in this case because "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[289]

In *Hosanna-Tabor*, the Court for the first time specifically held that under both of these clauses, there was a ministerial exception to the operation of federal laws prohibiting discrimination in employment.[290] As the Chief Justice stated,

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to

286. *See, e.g.*, Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (holding no exemption from substance abuse laws for the use of peyote in the religious ceremonies of the Native American Church).

287. *Hosanna-Tabor*, 132 S. Ct. at 694.

288. *Id.* at 703.

289. *Id.* at 702.

290. He noted that the federal courts of appeal "have had extensive experience [in dealing] with this issue" in the context "of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, and other employment discrimination laws" and "have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 705.

> shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[291]

In *Hosanna-Tabor*, the Court not only recognized a ministerial exception to the operation of anti-discrimination laws but held that in this case the question of whether the particular employee came within the exception had to be determined by the religious doctrine of the church employer. The employee in this case was a member of the Lutheran Church-Missouri Synod and was employed as a teacher at Hosanna-Tabor Evangelical Lutheran Church and School, a small Lutheran parochial school operated by a Lutheran congregation that "offer[ed] a Christ-centered education to students in kindergarten through eighth grade."[292] But under church law, she was considered a "called" teacher rather than a lay teacher.[293]

> [While the school board appointed lay teachers,] called teachers [were] regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher [had to] satisfy certain academic requirements. One way of doing so [was] by completing a "colloquy" program at a Lutheran college or university. The program require[d] candidates to take eight courses of theological study, obtain the endorsement of their local Synod district and pass an oral examination by a faculty committee. A teacher who [met] these requirements [could] be "called" by a [local] congregation. Once "called," a teacher [would] receive the formal title of "Minister of Religion, Commissioned." A commissioned minister serve[d] for an open-ended term, and at Hosanna-Tabor, a call could only be rescinded for cause and by a supermajority vote of the congregation.[294]

The employee here was a "called" teacher.[295] She taught secular courses and "also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service, [which she led] herself about twice a

291. *Id.* at 706.
292. *Id.* at 699.
293 *Hosanna-Tabor*, 132 S. Ct at 699.
294. *Id.* at 699.
295. *Id.* at 700.

year."[296] When she became ill with narcolepsy, the congregation put her on disability leave and later concluded that it was unlikely that she would be physically capable of returning to work in the future.[297] The congregation offered her a "peaceful release" from her call and tried to negotiate her resignation from the school.[298] She refused and threatened legal action against the congregation.[299] The congregation then voted to rescind her call and sent her a letter of termination.[300]

The United States EEOC brought suit against Hosanna-Tabor, alleging that the employee had been fired in retaliation for threatening to file a suit under the Americans with Disabilities Act (ADA),[301] and the employee joined the suit, asserting a claim for unlawful retaliation both under the ADA and the state disabilities rights law.[302] The suit sought her reinstatement to her former position and monetary relief.[303] The United States Court of Appeals for the Sixth Circuit recognized the existence of a ministerial exemption barring certain employment discrimination claims against religious institutions, but the court held that the employee did not qualify as a "minister" under the exception, because the duties of "called" teachers at the school were the same as the duties of lay teachers.[304]

The Supreme Court, citing the above cases which held that the courts cannot interfere with the decisions of the appropriate ecclesiastical authority within the church as to which persons are entitled to serve as ecclesiastical officials[305] and distinguishing the cases holding that there was no Free Exercise-mandated exception for neutral laws of general application,[306] held that as a constitutional matter, the ministerial exemption had to apply in this case.[307] The Court found that it was highly relevant that *Hosanna-Tabor* held the employee out to be a "minister" after she had completed a course of religious training, and that it was less relevant both that lay teachers performed the same religious duties as the "called" teacher and that the "called" teacher also performed secular

296. *Id.*
297. *Id.* at 700.
298. *Id.*
299. *Hosanna-Tabor*, 132 S. Ct at 700.
300. *Id.*
301. 42 U.S.C. §§ 12101-12213.
302. *Hosanna-Tabor*, 132 S. Ct. at 701.
303. *Id.*
304. *Id.* at 701-02.
305. Wynne v. Great Falls, S.C., 376 F.3d 292, 298 (4th Cir. 2004).
306. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (holding that state substance abuse laws could constitutionally be applied to the use of peyote in the religious ceremonies of the Native American Church).
307. *Hosanna-Tabor*, 132 S. Ct. at 706-07.

duties.[308] What appeared to be dispositive for the Court was that the church was entitled to decide who would be its ministers, and the ministerial exception "ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."[309]

However, totally apart from an interference with the religious freedom of a religious organization and the entitlement of a church to "select and control who will be minister to the faithful," there is the Establishment Clause concern that the application of a regulatory law to the activities of a religious organization would "entangle" the government in the determination of religious matters that are more properly the province of the religious organization. In *NLRB v. Catholic Bishop of Chicago*,[310] the Supreme Court, invoking the statutory interpretation principle that, when possible, a statute will be interpreted so as to avoid a serious question as to its constitutionality, held that Congress did not intend that the National Labor Relations Act[311] would apply to the unionization of lay faculty members at parochial schools.[312] The Court noted that in *Lemon*, it had found an "entanglement" between the teaching of the religious and the secular in parochial schools and that the Board's resolution of unfair labor practices at the schools would, in many instances, involve an inquiry into the good faith of the position asserted by clergy-administrators and its relationship to the schools'

308. *Id.* at 708-09.

309. *Id.* at 709 (citations omitted). The Court concluded:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Id. at 710. The Court noted that it was not deciding in this case whether or not the ministerial exception would bar other types of suits by an employee against a church employer, including actions alleging breach of contract or tortious conduct by the church employer. *Id.*

In a concurring opinion, Justice Thomas stated that the fact that the church considered the employee a minister should be dispositive. *Id.* at 710-11 (Thomas, J., concurring). In another concurring opinion, Justices Alito and Kagan emphasized that the formal ordination and designation of a church employee as a "minister" should not be controlling in deciding whether the church is entitled to invoke the ministerial exemption. *Hosanna-Tabor*, 132 S. Ct. at 711-16 (Alito, J., concurring). They pointed out that the use of the term "minister" or concept of ordination was not followed by some religious groups and that what mattered here was that the employee performed important religious functions, so the church alone had the right to decide for itself whether she was religiously qualified to remain in her office. 132 S. Ct. at 711-16 (Alito, J., concurring).

310. 440 U.S. 490 (1979).

311. 29 U.S.C. §§ 151-169.

312. *Catholic Bishop*, 440 U.S. at 504-07.

"religious mission."[313] Because of these "entanglement" concerns, the Court concluded that Congress did not intend that the Act would apply to the unionization of lay faculty members at parochial schools.[314] The Court has also held that Congress did not intend that non-profit, church-affiliated schools would be subject to federal unemployment compensation laws.[315] However, the Court saw no constitutional problem in applying the federal wages and hours law to a commercial business operated by a religious organization and staffed by former drug addicts, derelicts, or criminals before their conversion and rehabilitation by the foundation.[316] Nor did the Court see any constitutional problem in the application of a state sales and use tax to a religious organization's sale of religious materials.[317]

Because *Catholic Bishop* was decided on statutory interpretation grounds, it does not serve as a binding precedent with respect to the application of the Act to non-faculty employees of parochial schools or the application of other federal laws to the activities of religious

313. *Id.* at 501-02. The Court also quoted the following language from *Lemon*: "'The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.'" *Id.* at 503 (quoting Lemon v. Kurtzman, 403 U.S. 602, 616 (1971)).

314. *Id.* at 506.

315. St. Martin Lutheran Evangelical Church v. South Dakota, 451 U.S. 772 (1981). This decision was based primarily on general principles of statutory interpretation rather than on a concern with avoiding a serious constitutional question.

316. Troy & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985). The foundation was a nonprofit religious organization that operated a number of commercial businesses, including service stations, retail clothing and grocery outlets, roofing and electrical construction companies, a candy company, and a motel. *Id.* at 292. The converted and rehabilitated workers received no cash salaries but were provided with "food, clothing, shelter, and other benefits." *Id.* The district court found that these workers were "employees" within the meaning of the federal wages and hours law under the "economic reality" test of employment. *Id.* at 293-94. The Court held that the application of the law to the foundation's commercial businesses did not implicate the Free Exercise Clause because the required payments in cash to the workers, which they could voluntarily return to the foundation, did not in any way interfere with their religious beliefs. *Id.* at 303-05. The foundation's "entanglement" objection to the record keeping requirements of the law was rejected on the ground that the routine and factual inquires required by the law "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion." *Id.* at 305.

317. *See* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990); *see also* Hernandez v. Comm'r, 490 U.S. 680 (1989) (holding that the Internal Revenue Code's deduction for contributions to charitable and religious institutions did not include fixed fees paid for spiritual auditing and training services, because the payments were made in exchange for something of value). The Court noted that disallowing such a deduction avoided Establishment Clause problems because it did not require the Internal Revenue Service to decide which services and benefits were religious in nature. *Id.* at 694-98.

organizations. Likewise, because the Court avoided the constitutional question in that case, it is not a precedent on the question of whether the application of a particular law to the activities of a religious organization violates the Establishment Clause or the Free Exercise Clause. Some subsequent lower court cases, discussed in the earlier article, have dealt with these questions and have held both that the law applied and that its application in the particular case did not violate the Establishment Clause or the Free Exercise Clause. The Ninth Circuit held that *Catholic Bishop* was limited to the unionization of teachers at a parochial school and that the National Labor Relations Act did apply to the unionization of non-faculty personnel, such as child-care workers, cooks, recreation assistants, and maintenance workers at a Catholic school for boys.[318] The court also found that the exercise of jurisdiction over the unionization of these employees did not violate the Establishment Clause.[319] Because the duties of these employees were overwhelmingly secular, the Board's exercise of jurisdiction over them would not involve the Board in the school's religious mission, nor would there be any governmental monitoring of the school's religious activities.[320] And contrary to the interpretation given to the National Labor Relations Act by the United States Supreme Court in *Catholic Bishop*, the Minnesota Supreme Court held that the Minnesota Labor Relations Act was intended to apply to the unionization of lay faculty members at parochial schools and that allowing lay faculty members to collectively bargain did not create an "impermissible entanglement" between government and religion, and so did not violate the Establishment Clause.[321]

In a similar vein, the Second Circuit has held that the federal Age Discrimination in Employment Act [322] was applicable to age

318. NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991), *cert. denied*, 504 U.S. 1295 (1992).

319. *Id.* at 1302-06.

320. *Id.* at 1302-06. See also Catholic Social Servs., Diocese of Bellville, 355 N.L.R.B. 929 (2010), in which the NLRB exercised jurisdiction over a non-profit licensed child care facility operated by Catholic Social Services, a not-for-profit Illinois business corporation.

321. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn.1992). As the court stated,

> We decline to categorize this minimal responsibility as excessive entanglement. Allowing lay teachers, almost all of whom are Catholic, to bargain collectively will not alter or impinge on the religious character of the school. The first amendment wall of separation between church and state does not prohibit limited governmental regulation of purely secular aspects of a church school's operation.

Id. at 864. The court also held that this "limited governmental regulation of purely secular aspects of a church school's operation" under a generally applicable law would not violate the Free Exercise Clause. *Id.* at 862.

322. 29 U.S.C. §§ 621-634.

discrimination claims brought by a lay teacher against his parochial school employer.[323] In holding that the application of the law to such claims did not violate the Establishment Clause, the court emphasized that the sole question in an age discrimination case was whether an employee had been unjustly discriminated against because of age.[324] No Establishment Clause problem would be presented when the parochial school employer asserted that the employee was discharged not because of his age but for religiously based reasons. In such a case, the court cannot inquire into the plausibility of the religiously based reasons. The inquiry is limited to the question of whether, in fact, the employee was discharged for the asserted religiously based reasons or because of his age.[325] The Eighth Circuit reached the same conclusion in an age discrimination claim brought by the administrator of a Jewish synagogue.[326]

These cases have not been qualified by subsequent cases and are not affected by the Supreme Court's decision in *Hosanna-Tabor*, since they involved only lay employees of a religious institution. As these cases indicate, the mere fact that a court or governmental agency exercises jurisdiction over employment relations at a religious institution does not necessarily create an entanglement problem. An entanglement problem only arises when the court or agency either applies the law to invalidate an action that was religiously based or is required to interpret religious doctrine to resolve the particular dispute. Such a situation occurred in a case where a Catholic nun who had been denied tenure in the Canon Law department of the Catholic University of America brought a Title VII sex discrimination claim against the university.[327] The District of Columbia Circuit concluded that the Establishment Clause precluded the civil courts from determining the validity of the claim, both because in so doing they would be required to evaluate the teacher's scholarship and her teaching of religious doctrine and because the inquiry itself would intrude into the church's ability to make religious judgments about its officials.[328] By the same token, both the Establishment Clause and the Free Exercise clause interact to protect the decision of a religious organization to terminate an employee who has engaged in conduct that

323. DeMarco v. Holy Cross High Sch., 4 F.3d 166 (2d Cir. 1993).

324. *Id.* at 170.

325. *Id.* at 169-71. In this case, the school claimed that the employee was not discharged because of his age, but because he failed to perform his religious duties. *Id.* at 168. The court noted that this defense involved the determination of a factual question, which could be resolved "without putting into issue the validity or truthfulness of Catholic religious teaching." *Id.* at 172.

326. Weissman v. Congregation Sharre Emeth, 38 F.3d 1038 (8th Cir. 1994).

327. EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996).

328. *Id.*

violates the essential tenets of the religion and so renders the employee unfit to advance the organization's religious mission, such as when a teacher at a Catholic parochial school, who had been divorced and had not obtained annulment of her prior marriage in the Catholic Church, remarried a man who had been baptized as a Catholic,[329] or when a teacher at a Catholic parochial school engaged in sexual relations outside of marriage.[330]

A third application of the excessive entanglement principle precludes the government from protecting religiously based activity when, in order to do so, it must enforce the requirements of religious law. This application of the excessive entanglement principle has been involved in lower court cases invalidating laws prohibiting the fraudulent sale of kosher food.[331] Kosher food has been prepared in compliance with the Orthodox Jewish religious rules and dietary laws.[332] In order to determine whether or not particular food has been prepared in compliance with Orthodox Jewish religious rules and dietary laws, government officials must either apply Jewish religious law or delegate

329. See Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991), in which the teacher was a Protestant and brought a religious discrimination claim under Title VII. Title VII contains a "religious entity" exception, under which religious organizations and religious schools may limit employment to persons of their religion. *Id.* at 945-46. But if the religious organization or religious entity does not limit employment to persons of their own religion, it may not avoid the application of Title VII. *Id.* In this case, the Third Circuit, in order to avoid a serious constitutional question, construed the "religious entity" exception very broadly to cover an employee's conformity with the religious entity's religious beliefs. *Id.* at 945.

330. Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996). However, if the teacher was a woman and became pregnant as a result of having sexual relations outside of marriage, she is entitled to show that she was discharged because of her pregnancy and not because she had sex outside of marriage, so that her discharge would violate the federal Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). She can make such a showing by proving that the policy against having sex outside of marriage was enforced only against pregnant women and not against men or against women who were not pregnant. Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000). In a very recent and post-*Hosanna-Tabor* case, an unmarried, non-Catholic technology coordinator at a Catholic parochial school was terminated because she became pregnant by means of artificial insemination. Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012). The school contended that becoming pregnant by means of artificial insemination was a violation of Catholic religious doctrine. *Id.* The court held that the "ministerial exception" did not apply to bar her claims and that for purposes of the school's motion to dismiss, she had made out a plausible claim of pregnancy discrimination. *Id.* The court subsequently held that the case could proceed to trial on the issue of whether the plausible justification for the plaintiff's termination was equally applied to male employees. Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2013 WL 360355 (S.D. Ohio Jan. 30, 2013).

331. *See* Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337 (4th Cir. 1995); *see also* Ran-Dav's Cnty. Kosher v. State, 608 A.2d 1353 (N.J. 1992).

332. *See* MICHAEL A. FISHBANE, JUDAISM 144 (1987).

the determination to Orthodox Jewish rabbis. Either way, there has been an impermissible entanglement between government and religion. However, consistent with the Establishment Clause, the government could prohibit the fraudulent display of the kosher seal of approval that is placed on food products after they have been certified as kosher by an Orthodox Jewish rabbi. In such a case, the court or agency would only have to determine the factual question of whether the product had been certified as kosher by an Orthodox Jewish rabbi. In addition, the law would serve the secular purpose of preventing consumer fraud by the sale of products fraudulently labeled as having the kosher seal.

Our review of the cases in this area indicates that the excessive entanglement principle prohibits the government from making determinations of religious doctrine and from evaluating or enforcing religious doctrine. As the recently decided *Hosanna-Tabor* case makes clear, it also prohibits the government from interfering with the freedom of religious organizations to "select and control who will be minister to the faithful" and to implement their religious values in their operations and programs. [333] However, with these important exceptions, the excessive entanglement principle does not constrain the ability of the government to apply generally applicable laws to regulate the activities of religious organizations.[334]

E. Preference for Religion

Because the overriding principle of the Establishment Clause is that the Establishment Clause commands complete official neutrality toward religion, it necessarily follows that the government cannot favor religion over non-religion, and it cannot favor one religion over another religion.[335] While cases in which the government has acted to favor one religion over another are fairly rare,[336] there have been a number of

333. Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 132 S. Ct. 694, 709 (2012).

334. *Id.*

335. *See* Wallace v. Jaffree, 472 U.S. 38, 60 (1985); *see also* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (stating the classic definition of non-establishment in *Everson*: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another").

336. The only Supreme Court case that clearly falls into this category is *Larson v. Valente*, 456 U.S. 228 (1982), which involved a state law requiring charitable organizations to register but exempting organizations that received less than half their funds from members. The law was held unconstitutional as applied to the required registration of a religious organization that received more than half of its funds from non-members. *See id.* at 230-32. The "half the funds from non-members" rule was characterized by the Court as creating a preference between religions, and so it violated the Establishment Clause. *See id.* at 255.

Supreme Court cases in which the Court found an Establishment Clause violation because the government was expressly giving preference to religion over non-religion. These cases include the following: a state law providing an exemption from the state sales tax for religious periodicals;[337] a state law giving churches the power to prevent the issuance of a liquor license to a business that would be located within 500 feet of the church;[338] a state law setting up a special school district embracing the boundaries of a religious community;[339] and a state law entitling an employee to take off work on the day that the employee observed as the Sabbath.[340] In this regard, the Establishment Clause does not permit the government to prefer religion over non-religion on the ground that, by so doing, the government is making an "accommodation" for religion.[341] Stated simply, precisely because the overriding principle of the Establishment Clause is one of complete official neutrality toward religion, the Establishment Clause does not permit any "accommodation" for religion.[342]

However, while the Establishment Clause precludes the government from giving any preference to religion over non-religion, the overriding principle of complete official neutrality toward religion also means that the government is not required to be hostile to religion. As we have discussed previously, under the subsidiary doctrine of the non-discriminatory inclusion of religion, the inclusion of the religious with the secular in the receipt of governmental benefits does not necessarily violate the Establishment Clause, and the Court has gone quite far in

337. Tex. Monthly v. Bullock, 489 U.S. 1 (1989).

338. Larkin v. Grendel's Den, 459 U.S. 116 (1982).

339. Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

340. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). The effect of the law was to give a preference for religion, as the only employees who could choose their day off were employees who could say that they observed that day as their Sabbath. *Id.* There was no requirement that their religion precluded them from working on the Sabbath or that they used the Sabbath day for religious purposes. *Id.* Thus, the law was in no way precisely tailored to protect the religious freedom of employees whose religion precluded them from working on the Sabbath. *Id.*

341. *Id.*

342. *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding as an "accommodation for religion" a public school's "released time" program under which students could leave the school for a specified period of time during the school day to receive religious instruction in non-school facilities). The result is clearly inconsistent with later-decided cases such as *Thornton,* which hold that the government cannot give any preference to religion under the guise of making an "accommodation" for religion. *See Thornton,* 472 U.S. 703. The Court has had no occasion to reconsider *Zorach* in more recent years, since these kinds of "released time" programs have pretty much been eliminated from the public schools. In any event, *Zorach* has no precedential significance, and if it survives, it is limited to its precise facts.

upholding the constitutionality of such inclusions.[343] Thus, some of the preferences for religion that the Court has found unconstitutional could have been sustained if the benefit involved had also been provided to similarly situated non-religious groups. A state can provide a sales tax exemption for all non-profit periodicals, including religious ones. Zoning laws frequently prohibit the location of businesses serving liquor or providing "adult entertainment" near residences, churches, schools, and similar places. If a state wants to enable employees to take off work on the day that the employee observes as the Sabbath, it can do so by giving all employees the right to choose a day off from work. Again, what the Establishment Clause prohibits is a preference for religion over non-religion. It does not, as such, prohibit the government from including the religious with the secular in the receipt of governmental benefits.

A different question is presented when the government takes action that is precisely tailored to protect the religious freedom of individuals and religious institutions. We have previously discussed the subsidiary doctrine of accommodation for religious freedom, but not for religion. Under this subsidiary doctrine, the government may take action that is precisely tailored to protect the religious freedom of individuals and religious institutions.[344] I discussed the application of this doctrine at length in the original article[345] and have brought it up to date in a more recent article.[346] I now want to elaborate somewhat on this discussion and to specifically include a discussion of the 2005 case of *Cutter v. Wilkinson*,[347] in which the Court made it absolutely clear that governmental action that is precisely tailored to protect the religious freedom of individuals and religious institutions does not violate the Establishment Clause.

The reason that this is so is because the Establishment Clause and the Free Exercise Clause operate in tandem, and the objective of the Religion Clauses, taken together, is to promote religious freedom. Religious freedom is thus a favored constitutional value, and it would be inconsistent with the overriding purpose of the Religion Clauses, taken together, for the Court to hold that the Establishment Clause necessarily precludes the government from acting to protect the religious freedom of individuals and religious institutions. It is irrelevant in this regard that the

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343. *See supra* notes 87-90 and accompanying text. The application of this subsidiary doctrine has led the Court to uphold a substantial number of governmental programs providing aid to children and parents that include children attending parochial schools and their parents. *See supra* notes 137-200 and accompanying text.

344. *See supra* notes 76-84 and accompanying text.

345. *See* Sedler, *supra* note 1, at 1422, 1437.

346. *See* Robert A. Sedler, *Essay: The Constitutional Protection of Religious Freedom Under the American Constitution*, 53 WAYNE L. REV. 817, 826-32 (2007).

347. 544 U.S. 709 (2005).

failure of the government to take such action and that the application of facially neutral laws to the religiously based conduct of individuals and religious institutions would not violate the Free Exercise Clause. The measure of what the government cannot constitutionally do is not the measure of what the government is constitutionally permitted to do. So long as the government's action is precisely tailored to protect the religious freedom of individuals and religious institutions, that action advances the overriding purpose of the Religion Clauses, taken as a whole, and so does not violate the Establishment Clause. Moreover, because the government's action advances the overriding purpose of the Religion Clauses, taken as a whole, and because religious freedom is a favored constitutional value, it does not matter that such action has the effect of preferring religious based activity to other kinds of activity and of providing a religiously based exemption from generally applicable laws.[348]

In order to satisfy the standard of "precisely tailored to protect the religious freedom of an individual or religious institution," the action must be directed toward obviating an interference with religious freedom. An interference with an individual's religious freedom occurs when the individual is prevented from doing something that his/her religion requires, such as when a member of the Native American church is prohibited from using peyote in a religious ceremony,[349] or when someone is compelled to do something that the person's religion prohibits, such as when a Sabbatarian is required to work on Saturday.[350] An interference with the freedom of a religious institution occurs when

348. For an interesting discussion of what the author of the writing calls "religious accommodation" and an effort to summarize the Supreme Court's decisions in this area in terms of "black letter rules for religious accommodation," see Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis,* 110 W. VA. L. REV. 359 (2007).

349. The prohibition on the use of peyote in the religious ceremonies of the Native American Church has been held not to violate the Free Exercise Clause, since the Free Exercise Clause does not require that the government exempt religiously-based conduct from neutral and generally applicable laws. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

350. The Court has held that the denial of unemployment compensation to a Sabbatarian who refused Saturday work and to a person who, on religious grounds, refused to work in weapons production violated the Free Exercise Clause. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981). In *Smith*, the Court distinguished these cases, noting that the decisions "stand for the proposition that where the state has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. The effect of this distinction is to limit the holding of these cases to the "discriminatory exclusion of religion" from a system of individualized exemptions.

the law prevents the institution from carrying out its religious function, such as when a law prohibits a religious institution from employing only its adherents in the religious activities of the institution or when a zoning law prohibits the construction of a religious facility in a residential area.[351]

The proposition that the government may take action to protect the religious freedom of individuals and religious institutions was best illustrated at the time of the original article by the Supreme Court cases dealing with Title VII's "religious entities" and "reasonable accommodation" provisions. Under the "religious entities" exemption, religious organizations are exempted from Title VII's religious discrimination prohibition with respect to employing individuals of the same religion to carry out the work of the organization.[352] In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[353] the Court unanimously held that this exemption did not violate the Establishment Clause, even as applied to a religious organization's non-profit, secular activities.[354] The Court first noted that the government may in some circumstances accommodate religious practices without violating the Establishment Clause and that the limits of permissible accommodation were not coextensive with the noninterference mandated by the Free Exercise Clause. As the Court stated, "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" [355] The Court then pointed out that it was a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions and that a law was not unconstitutional simply because it allowed churches to advance religion, which is their very purpose.[356] Finally, the Court concluded that there was no constitutional objection to the exemption singling out religious entities for a benefit. The Court stated, "Where, as here, the government acts with the proper purpose of lifting a regulation

351. *See generally* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

352. 42 U.S.C. § 2000e-1 (1994). *See also* Esbeck, *supra* note 348.

353. 483 U.S. at 339. The church operated a gymnasium, open to the public, and required that its employees be church members in good standing.

353. *Id.* at 334.

354. *Id.*

356. *Id.* at 335-36.

356. *Id.* at 335-36.

that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."[357]

Title VII's prohibition against religious discrimination requires that employers make a "reasonable accommodation" for an employee's religious beliefs, as long as this can be done without undue hardship on the conduct of the employer's business.[358] In *Trans World Airlines v. Harrison,*[359] the Court interpreted "reasonable accommodation" very narrowly by holding that an employer was not required to accommodate a Sabbatarian's effort to avoid Saturday work when this would require the employer to disregard the seniority system established by the collective bargaining agreement.[360] Had the employer been required to do so, "the privilege of having Saturdays off would be allocated according to religious beliefs," and in the absence of clear statutory or legislative history to the contrary, the Court was unwilling to construe the law to "require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[361] As *Hardison* indicates, in the employment context, an effort to protect one employee's religious freedom may impose substantial costs on other employees, and, therefore, a narrow interpretation of "reasonable accommodation" was necessary in order to prevent a resulting preference for religion over non-religion and to satisfy the constitutionally required "precisely tailored" standard. An example of a precisely tailored "reasonable accommodation" is the "substituted charity" provision of federal labor relations law that enables persons who have religious objections to joining unions to avoid paying union dues or representation fees and instead make a charitable contribution in an equivalent amount.[362]

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357. *Id.* at 338. Justice Brennan, concurring, said that while the exemption should ideally be limited to the organization's religious activities, a court's determination of whether a particular activity was "religious" or "secular" would require ongoing governmental entanglement in religious affairs and could chill the organization's religious activity. *Presiding Bishiop*, 483 U.S. at 343-44 (Brennan, J., concurring). Justice O'Connor, concurring, suggested that the exemption might be unconstitutional as applied to the organization's profit-making enterprises and emphasized that this question was not before the Court in that case. *Id.* at 349 (O'Connor, J., concurring).

358. 42 U.S.C. § 2000e(j).

359. 432 U.S. 63 (1977).

360. *Id.* at 84.

361. *Id.* at 84-85.

362. 29 U.S.C. § 169 (1994). *See* Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1242 (9th Cir. 1981). Another example of a reasonable accommodation is found in *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569 (7th Cir. 1997), in which two Jewish employees of a skin care salon had made a request two weeks in advance for time off from work on Yom Kippur, the holiest Jewish holiday, when the employer could have reassigned or rescheduled their previously booked appointments.

In most of the cases in which the government has acted to protect the religious freedom of individuals and religious institutions, the government's actions do not impose substantial costs on others. When the government does not deny unemployment compensation to a Sabbatarian who refuses Saturday work, for example, the costs of this accommodation are borne entirely by the government itself.[363] So too, when Sunday closing laws were in effect, an exemption for Sabbatarians from those laws merely equalized the competitive situation for Sabbatarians and non-Sabbatarians. Both were required to close their businesses for one day, the Sabbatarian on Saturday and the non-Sabbatarian on Sunday.[364]

The Supreme Court's decision in *Presiding Bishop* was followed by a number of lower court cases upholding governmental actions designed to protect the religious freedom of individuals and religious institutions. Usually these actions involved religiously based exemptions from generally applicable laws.[365] Sometimes they favored a single religious group, but when this was so, it was because only that group had demonstrated that compliance with the law would substantially interfere with its religious freedom. These cases include the following: an exemption from social security self-employment taxes for members of religious sects that have tenets opposed to participation in the social security system and that provide reasonable support for their dependent members;[366] a zoning law exception that permitted non-profit day care

363. This accommodation is required by the Free Exercise Clause. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

364. The Court had held that Sunday closing laws did not violate the Establishment Clause, *see* McGowan v. Maryland, 366 U.S. 420 (1961), and that they did not violate the Free Exercise Clause as applied to a Sabbatarian who was required to close his store on Sunday after closing it on Saturday for religious reasons, *see* Braunfeld v. Brown, 366 U.S. 599 (1961). In *Braunfeld*, the Court noted that a number of states did provide such an exemption and stated that "this may well be the wiser solution to the problem." *Id.* at 608. The exemption was upheld in a number of state court cases. *See, e.g.*, Kentucky v. Arlan's Dep't Store, 357 S.W.2d 708 (Ky.), *appeal dismissed*, 371 U.S. 218 (1962).

365. It will be recalled that in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Free Exercise Clause did not require that the government exempt religiously based conduct from neutral and generally applicable laws (in that case, the use of an illegal substance, peyote, in the religious ceremonies of the Native American church).

366. *See* Droz v. Comm'r, 48 F.3d 1120 (9th Cir. 1995). The exemption extends only to self-employed taxpayers. In *United States v. Lee*, 455 U.S. 252 (1982), the Court held that the imposition of social security taxes on an Amish employer who had failed to pay his own taxes and failed to withhold the taxes from the wages of his Amish employees did not violate the Free Exercise Clause. The plaintiff in *Droz* claimed that he had religious objections to paying the social security self-employment tax; however, he was not entitled to assert the objection under the law because he was not a member of a recognized sect. *Droz*, 48 F.3d at 1122. The decision in *Lee* foreclosed his free exercise

facilities and nursery schools to operate in church buildings located in residential neighborhoods;[367] an exemption from federal substance abuse laws and eagle protection laws for the use of peyote and eagle feathers in the religious ceremonies of Native-American tribes;[368] and an exemption

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claim. *Id.* at 1123. In *Lee*, the Court had noted that the self-employed exemption only provided for a narrow category exemption that was readily identifiable, in that "[s]elf-employed persons in a religious community having its own 'welfare' system are distinguishable from the generality of wage earners employed by others." *Lee*, 455 U.S. at 260-261. The plaintiff's Establishment Clause challenge in *Droz* was based on the argument that exemption favored one religion over another. *Droz*, 48 F.3d at 1122. The court rejected the challenge, saying that the exemption was for an organization that had its own welfare system and so did not discriminate between religions based on religious beliefs. *Id.* at 1124.

367. Cohen v. City of Des Plaines, 8 F.3d 484 (7th Cir. 1993). The exemption was contained in a zoning law that permitted churches in areas otherwise zoned as single family residential. *Id.* at 486-87. The law was challenged by the owner of commercial day care facilities who wanted to operate in residential neighborhoods. *Id.* The city justified the exemption as being related to avoiding entanglement with the decision-making processes of a religious organization. In upholding the ordinance, the Seventh Circuit relied heavily on *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). *See id.* at 490-92.

368. *See* Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (peyote exemption); Rupert v. Dir., U.S. Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992) (eagle feathers exemption). In these cases, the exemptions for the use of peyote and eagle feathers in the religious ceremonies of Native American tribes were challenged as constituting a religious preference by other groups seeking to use peyote and eagle feathers for religious purposes. The courts were able to avoid the religious preference claim by finding that the exemption was based on the sovereignty of Native American tribes and their special relationship with the federal government. *Thornburgh*, 922 F.2d at 1214-16; *Rupert*, 957 F.2d at 33-35. *Cf.* Morton v. Mancari, 417 U.S. 535 (1974) (finding that a preference for Native Americans in employment at the Bureau of Indian Affairs does not constitute national origin discrimination in violation of Title VII). If the peyote exemption, for example, had been for all religious groups, as opposed to ordinary drug users, this would be constitutionally permissible as a means of protecting the religious freedom of individuals and religious institutions. *See Thornburgh*, 922 F.2d at 1214-18.

In *Gonzales v. O Cento Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 433 (2006) (discussed *infra* note 385), the Court referred to "the well-established peyote exception" and noted that this exception "undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions."

During Prohibition, there was an exemption for sacramental wine used in religious services. In speaking of this exemption, Professor Laycock has observed that this and similar exemptions were fully consistent with "substantive neutrality" toward religion. Laycock, *supra* note 28, at 1003.

> To prohibit the consumption of alcohol, without an exception for religious rituals, is to flatly prohibit important religious practices. Such a prohibition would discourage religious practices in the most coercive possible way—by criminalizing it. Many believers would abandon their religious practice; some would defy the law; some would go to jail. Such a law would be a massive departure from substantive neutrality.

Id.

for Amish buggies from the requirement that slow-moving vehicles display a special emblem.[369]

It also cannot be disputed that the government may, consistent with the Establishment Clause, take actions that are precisely tailored to protect the religious freedom of individuals who are subject to governmental control. A public school system may try to protect the religious freedom of public school students by respecting religious prohibitions against immodest dress or nakedness in the presence of others and not requiring these students to wear gym clothes or to shower.[370] Likewise, the military and the prison system may try to accommodate the religious needs of persons under their control by providing them with chaplains,[371] releasing them for religious services, excusing them from uniform requirements,[372] and enabling them to observe dietary restrictions.

This brings us to the Supreme Court's 2005 decision in *Cutter v. Wilkinson*,[373] in which the Court unanimously held that the Establishment Clause did not prevent Congress from requiring that prison officials make a "reasonable accommodation" for the religious practices of their inmates. Such an accommodation was required by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[374] which provides, *inter alia*, that institutional regulations that impose a substantial burden on the religious practices of institutionalized persons are invalid unless they can be justified under the rigorous compelling governmental interest standard. RLUIPA was enacted under the spending power and applies only to state and local governmental programs and

369. State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (holding that such an exemption was required by the state constitution and that the exemption did not violate the Establishment Clause). see also the older lower court case of *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974), in which the court upheld an exemption from the federal Humane Slaughter Law, 7 U.S.C. §§ 1901-1907 (1970), for Jewish Kosher religious slaughter and now for Muslim Halal religious slaughter and that of all religious faiths that use the severance of the carotid artery method of slaughter.

370. Muslim students must say prayers during the school day. Thus, it is permissible for the public schools both to excuse the students from class so that they can say these prayers and to provide a private place for them to do so. This has long been the practice of the Dearborn, Michigan, school system, which enrolls a large number of Muslim students.

371. *See, e.g.*, Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) (rejecting an Establishment Clause challenge to the military chaplaincy).

372. Congress has by statute, 10 U.S.C. § 774 (1994), overturned the "headgear regulation" upheld in *Goldman v. Weinberger*, 475 U.S. 503 (1986), against a Free Exercise challenge by an Orthodox Jewish officer, who was prohibited by the regulation from wearing a religiously required skullcap.

373. 544 U.S. 709 (2005).

374. 42 U.S.C. § 2000cc-1(a)(2) to (2) (2005).

activities receiving federal assistance.[375] In *Cutter*, the Sixth Circuit had held that the application of RLIUPA to the refusal of a state prison to make an exception to prison regulations so as to permit a non-traditional religious sect to hold religious services and engage in religious activities violated the Establishment Clause by favoring religious rights over other fundamental rights without any showing that religious rights were at any greater risk of deprivation in the prison context.[376]

The Supreme Court reversed in a unanimous opinion, holding that the application of RLIUPA to protect the religious practices of the prison inmates that were at issue in that case did not violate the Establishment Clause. The Court first noted that it "has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause"[377] and that "there is room for play in the joints between the Free Exercise Clause and the Establishment Clauses, allowing the government to accommodate religion beyond Free Exercise requirements without offense to the Establishment Clause."[378] It then noted that Congress had documented in hearings spanning three years that "frivolous or arbitrary" barriers impeded institutionalized

375. RLUIPA was Congress' response to the Supreme Court's 1997 decision in *Boerne v. Flores*, 521 U.S. 507 (1997), in which the Court overturned the major part of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (2005). Congress enacted RFRA in response to the Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), holding that the Free Exercise Clause did not require that the government exempt religiously based conduct from neutral and generally applicable laws. RFRA applied to all federal and state laws and provided that whenever any law "substantially burdened" a person's exercise of religion, the rigorous compelling governmental interest test applied, so that the government had to demonstrate that the law was in furtherance of a compelling governmental interest and that it was the least restrictive means of advancing that interest. The compelling governmental interest test applied even if the "substantial burden" on the person's exercise of religion resulted from a rule of general applicability. *Id.* In *Boerne*, the Court held that the Act was unconstitutional in its application to the states as being beyond Congress' enforcement power under section 5 of the Fourteenth Amendment. *Boerne*, 521 U.S. 507. RLIUPA was a much narrower law, enacted under the spending power and applicable only to state and local programs and activities receiving federal assistance. *See* 42 U.S.C. § 2000cc to cc-5 (2005).

376. *See Cutter*, 423 F.3d at 582 (6th Cir.), *rev'd.*, 544 U.S. 709 (2005). The Seventh and Ninth Circuits, by contrast, had held that the application of RLIUPA in the prison context did not violate the Establishment Clause, because it was constitutional for Congress to lift a burden on religious worship in prisons without affording corresponding protection to the secular activities of non-religious prisoners. *See* Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002).

377. *Cutter*, 544 U.S. at 713.

378. *Id.* The Court cited *Locke v. Davey*, 540 U.S. 712, 718 (2004), in which it had held that although the state would not be violating the Establishment Clause if it permitted state scholarship funds to be used for theology courses, the state did not violate the Free Exercise Clause by prohibiting the use of state funds for this purpose. *Cutter*, 544 U.S. at 718.

persons' religious exercise, and it found as a fact that on its face RLIUPA "qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."[379] This was so because RLIUPA "alleviates exceptional government-created burdens on private religious exercise" and "protects institutionalized persons who are unable to freely attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."[380] Moreover, RLIUPA would be applied in an "appropriately balanced way, with particular sensitivity to security concerns."[381] Finally, the Court concluded that the Sixth Circuit had misunderstood the Court's precedents when it held that the government could not give greater protection to religious rights than to other constitutionally protected rights. If this were the law, said the Court, "all manner of religious accommodations would fail," and the Court had held in other cases, most notably *Presiding Bishop*, [382] that religious accommodations need not "come packaged with benefits to secular entities."[383]

The Court thus has upheld against Establishment Clause challenge the provisions of RLUIPA requiring the state to make a reasonable accommodation for the religious needs of institutionalized persons.[384]

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379. *Id.* at 716.

380. *Id.* at 720.

381. *Id.* at 722.

382. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

383. *Cutter*, 544 U.S. at 327 (citing *Presiding Bishop*, 483 U.S. at 338).

384. The Supreme Court's decision in *Cutter* upholding the constitutionality of the institutionalized persons provisions of RLUIPA necessarily upholds the parallel land use provisions of RLUIPA. *See, e.g.*, Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 353-56 (2d Cir. 2007). There are four such provisions. One provision provides that if a land use regulation substantially burdens the free exercise of religion, the government must show that the burden serves a compelling governmental interest by the least restrictive means. Two provisions prohibit discrimination against religious institutions. And one provision deals with exclusion by providing that a land use regulation may not totally exclude religious assemblies or unreasonably limit religious assemblies, institutions, or structures within a jurisdiction. The substantial burden and equal terms provisions have been the most important and the most frequently litigated. See also the summary of the provisions and the discussion in Douglas Laycock and Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced,* 39 FORDHAM URB. L.J. 1021, 1023 (2012). No cases involving the land use provisions of RLUIPA have yet reached the Supreme Court. In commenting on the lower court RLUIPA cases, Laycock and Goodrich observed as follows:

> Over the twelve years since its enactment, RLUIPA has proven its worth. Churches have brought numerous successful lawsuits protecting their core First Amendment rights and many cases have settled. Local officials are now on notice that they cannot treat churches as a disfavored land use, despite the

The Court's decision in *Cutter* strongly affirms that proposition that the government can, consistent with the Establishment Clause, take action that is precisely tailored to protect the religious freedom of individuals and religious institutions.[385]

IV. CONCLUSION

In this article, I have revisited the "law of the Establishment Clause" that I first explored some sixteen years earlier. In the earlier article, I

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issues with NIMBY neighbors, tax collection, or commercial districts, or fear of Muslims or other prejudices among their constituents.

Id. at 2071. For recent illustrative cases involving RLUIPA challenges to land use regulation, see Bethel World Outreach Ministries v. Montgomery Cnty. Council, 706 F.3d 548 (4th Cir. 2013), Fortress Bible Church v. Feiner, 694 F.3d 208 (2d Cir. 2012), and Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011).

385. RFRA also remains in effect to the extent that it can constitutionally be applied to federal laws and regulations. In *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006), the Court applied RFRA to invalidate the application of Schedule I of the Controlled Substances Act, 21 U.S.C. § 812(c) (2005), to the use of hoasca, a tea containing a hallucinogen, in the religious practices of a very small sect in the United States. The Court held that RFRA and RLIUPA require case-by-case consideration of religious exemptions to generally applicable rules and that the government bears the burden of demonstrating that serious harm would result from the granting of specific exemptions to particular religious claimants. *Id.* The government could not sustain its burden in this case, just as the state prison system could not sustain its burden in *Cutter*. *Id.*

The Court has very recently granted certiorari to resolve a conflict among the circuits on the question of whether closely held, family, for-profit corporations operated according to religious principles can assert a RFRA challenge to provisions of the Patient Protection and Affordable Care Act that require group insurance plans, such as those provided to their employees by these corporations, to provide coverage without cost-sharing for preventive care and screening for women, 42 U.S.C. 300gg-13(a)(4), which, under guidelines created by the Health Resources and Services Administration, include approved contraceptive methods and sterilization procedures. Hobby Lobby Stores v. Sebelius, 723 F.3d 1114 (10th Cir. (2013), *cert. granted*, 134 S. Ct. 678 (2013). One of the family corporations objected on religious grounds to providing coverage for all contraceptives and the other objected on religious grounds to providing coverage for the "morning after pill" and the "week after pill." *Id.* The Tenth Circuit held in a 5-3 *en banc* decision that the corporation was covered by RFRA and that the requirement that they provide contraception coverage for their employees violated their rights under RFRA and the Free Exercise Clause. *Id.* The Third Circuit held in a 2-1 decision that a for-profit, secular corporation could not engage in the exercise of religion under RFRA or the Free Exercise Clause and that the owners did not have any claim because compliance with the health coverage mandate was placed on the corporation and not on the owners. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377 (3d Cir. 2013), *cert. granted*, Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013).

developed the thesis that when one looked at the Establishment Clause from the perspective of constitutional litigation, it was indeed possible to ascertain what I referred to as "the law of the Establishment Clause," and that the "law of the Establishment Clause" was not at all difficult to understand or to apply to the resolution of the Establishment Clause issues that arise in practice. It is the "law of the Establishment Clause" that is used by litigating lawyers and by the courts—including the Supreme Court—to litigate and resolve these issues.

In that article, I tried to explain the nature and operation of the "law of the Establishment Clause." I contended that the "law of the Establishment Clause" consisted of four components: (1) the overriding principle of complete official neutrality toward religion; (2) three operative principles, the three prongs of the *Lemon* test; (3) subsidiary doctrines, mostly related to the application of the second *Lemon* "effect of advancing religion" principle; and (4), most importantly, the precedents in what I identified as the five major areas of Establishment Clause litigation. It was my submission that as of that time, when the "law of the Establishment Clause" had been developing for almost fifty years, the "law of the Establishment Clause" could be considered to be fairly settled, and that the new Establishment Clause issues that would arise would be litigated and resolved within the analytical framework of the existing principles, doctrines, and precedents.

The most salient feature of my revisit of the "law of the Establishment Clause" is that in the fifteen-year period between 1997 and the end of the Court's last Term in 2012, there have been only seven cases in which the Supreme Court decided an Establishment Clause issue, including the Court's most recent decision, which was based on both the Establishment Clause and the Free Exercise Clause. I think that it is fair to say that these cases were litigated and resolved within the analytical framework of the existing principles, doctrines, and precedents.

Two of these cases involved financial aid to religion, and in both cases, a Court majority held that the particular form of financial aid—in one case, the inclusion of parochial school students with public school students in the loan of computers and other instructional materials, and in the other, the inclusion of vouchers for tuition at parochial schools along with other financial assistance for the parents of children attending underperforming schools—did not violate the Establishment Clause.[386] These cases involved the application of the doctrine of the non-discriminatory inclusion of religion[387] and the precedents distinguishing

386. Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002). *See supra* notes 144-200 and accompanying text.

387. *See supra* notes 85-90 and accompanying text.

between constitutionally impermissible "aid to parochial schools" and constitutionally permissible "aid to the child" attending parochial schools and to the parents of such children.[388] The effect of these decisions has been to permit the government to provide significant financial assistance to the educational function of parochial schools, so long as this assistance takes the form of providing the same benefits to children attending both public and parochial schools and the parents of such children. This result is consistent with the doctrine of the non-discriminatory inclusion of religion.

Two of the cases, decided the same day, involved public displays that included a religious symbol, here the Ten Commandments.[389] Applying the first *Lemon* principle—that in order for governmental action to be upheld under the Establishment Clause, the action must have a secular legislative purpose—the Court held in one of the cases that the display was unconstitutional because it was motivated by a religious purpose.[390] The constitutional question with respect to the display in the other case involved the second *Lemon* principle (that in order for governmental action to be upheld under the Establishment Clause, it cannot have the primary effect of advancing or inhibiting religion),[391] the resulting primary effect and incidental benefit doctrine,[392] and the Court's precedents dealing with the constitutionality of governmental displays that include religious symbols.[393] Applying these components of the "law of the Establishment Clause," the Court concluded that the inclusion of a Ten Commandments monument—which was presented to the State of Texas by a private civic organization in 1961 and located in a display on a twenty-two acre area of the Texas state capitol's grounds that contained seventeen monuments and historical markers "commemorating the people, ideals and events that compose Texan identity"—did not violate the Establishment Clause.[394] The effect of this decision is that when the display includes secular symbols, it will likely be held not to violate the Establishment Clause because it will not be sending a message of endorsement of religion. The display will be held unconstitutional if it can be shown that the display was motivated by a religious purpose or if the display consisted only of a religious symbol,

388. *See supra* notes 127-200 and accompanying text.

389. McCreary Cnty. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

390. *See supra* note 253-55 and accompanying text.

391. *See supra* notes 53-55 and accompanying text.

392. *See supra* notes 63-67 and accompanying text.

393. Lynch v. Donnelly, 465 U.S. 668 (1984); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989). *See supra* notes 222-71 and accompanying text.

394. Van Orden v. Perry, 545 U.S. 677 (2005). *See supra* notes 256-71 and accompanying text.

such as a nativity scene or a Ten Commandments monument standing alone, because it will then convey a message of endorsement of religion. The constitutional permissibility of displays containing a religious symbol has now been made very clear by these two decisions.

The holdings in the remaining three cases again involved the Court's application of the components of the "law of the Establishment Clause." The Court applied its precedents dealing with prayers in the public schools [395] to hold violative of the Establishment Clause a school district's policy authorizing a student election to determine whether the student body wanted to have a student deliver a "brief invocation and/or message" at varsity football games.[396] The decision continues the line of cases holding that all state-sponsored religious practices in the public schools, including prayers at commencements and at athletic events, violate the Establishment Clause. Next, applying the subsidiary doctrine of accommodation for religious freedom but not for religion,[397] the Court upheld as "precisely tailored to protect the religious freedom of an individual" the provision of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[398] requiring that prison officials make a "reasonable accommodation" for the religious practices of their inmates. [399] Finally, the Court applied the third *Lemon* "excessive entanglement" principle [400] to hold that the Establishment Clause, separate from the Free Exercise Clause, requires a "ministerial exception" to federal civil rights laws that precluded the application of those laws to invalidate the dismissal of a teacher at a private religious school who had been given the status of a religious official by the denomination operating the school.[401]

The Court's decisions in these seven cases, I would submit, support the proposition set forth in the earlier article that the "law of the Establishment Clause" could be considered to be fairly settled and that the new Establishment Clause issues that will arise will be litigated and resolved within the analytical framework of the existing principles, doctrines, and precedents.

The purpose of the Establishment Clause in the American constitutional system is to protect religious freedom by requiring that the

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395. *See supra* notes 109-114 and accompanying text.

396. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). *See supra* notes 115-117 and accompanying text.

397. *See supra* notes 80-84 and accompanying text.

398. 42 U.S.C. §§ 2000bb to bb-4 (2005).

399. Cutter v. Wilkinson, 544 U.S. 709 (2005). *See supra* notes 373-85 and accompanying text.

400. *See supra* notes 56-61 and accompanying text.

401. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012). *See supra* notes 286-309 and accompanying text.

government "pursue a course of complete official neutrality toward religion."[402] As Justice Douglas observed many years ago, while the Establishment Clause "reflects the philosophy that Church and State should be separated," "it does not say that in every and all respects there shall be a separation of Church and State." Rather, "it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other."[403] It has been the function of the "law of the Establishment Clause" to advance the philosophy of separation of Church and State and to achieve the objective of "defining the manner, the specific ways, in which there shall be no concert or union or dependency one on the other." It is my hope that in these two writings, some sixteen years apart, I have demonstrated how the "law of the Establishment Clause" has carried out this function and achieved this objective.

402. Wallace v. Jaffree, 472 U.S. 38, 60 (1981). The principle of complete official neutrality toward religion is the overriding principle of the Establishment Clause. *See supra* notes 22-33 and accompanying text.

403. Zorach v. Clauson, 343 U.S. 306, 312 (1952).